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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 520

ALLEN POPE,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 520

ALLEN POPE,

vs. *Petitioner,*

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

Opinion Below

The opinion of the Court of Claims (R. 47-60) is not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered October 1, 1945 (R. 146). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925,

as amended by the Act of May 22, 1939, and Section 4 of the Special Act of February 27, 1942 (see below).

Question Presented

The question now presented is, has the Court properly interpreted and applied the Special Act of February 27, 1942 (56 Stat. 1122), in accordance with the decision and mandate of this Court?

Statute Involved

The only statute involved is the Special Act of February 27, 1942, Private Law 306, 77th Congress, reading as follows:

"AN ACT

"To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

"Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation

and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and as to omit the timber lagging from the side walls of the tunnel; *and for the work of excavating materials which caved in over the tunnel arch* and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

"Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

"Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases" (Italics added).

Statement

Petitioner some years ago contracted to construct a large tunnel forming a part of the District of Columbia water supply system. Numerous disputes arose between him and the contracting officer, some of which, not being adjusted satisfactorily, were carried to the Court of Claims. That Court (76 C. Cls. 64) allowed some of the claims

asserted and disallowed others. Motions for new trial were overruled and a review by this Court was denied, 303 U. S. 654.

He, thereafter, sought relief from Congress, and the Special Act, Private Law 306, 77th Congress, was enacted (R. 1).

A petition under the Special Act was filed in the Court of Claims on July 7, 1942 (R. 1-9). Additional testimony to that taken in the old case was taken. The Court of Claims, concluding that the Special Act constituted a Congressional interference with judicial prerogatives and was therefore unconstitutional, dismissed the petition (100 C. Cls. 375).

This Court granted certiorari (321 U. S. 761), and, on review, reversed the Court of Claims, 323 U. S. 1.

Thereafter, in supposed compliance with the mandate of December 5, 1944, the Court of Claims reconsidered the claims under the Special Act and allowed some of them but disallowed one large and important item, namely, that for pay, at the contract rate for excavation, for excavating materials which caved in from over the tunnel arch (R. 63, 83). The petitioner now seeks review of this latest judgment, as contrary both to the Act, properly interpreted, and to the mandate of this Court.

Specification of Errors to Be Urged

The Court of Claims, under mandate, erred:

1. In deciding, in effect, that the Special Act of February 27, 1942, does not create a new cause of action on account of the "work of excavating materials which caved in over the tunnel arch."

2. In deciding the item of claim for "the work of excavating materials which caved in over the tunnel arch"

on the basis of the *contract* and not on the basis of a *new cause of action* created by the Special Act.

3. In holding (R. 73), "There is no intimation, either in the special act or the committee reports that Congress intended to create, for the plaintiff, rights to recover for them" (for excavation of caved-in materials).

4. In failing to render a judgment at the contract rates for excavation for the established quantities of materials excavated as a result of cave-ins from over the tunnel arch.

Reasons for Granting the Writ

1. The decision of the Court of Claims involves an erroneous construction of an Act of Congress that is not in harmony with what the Supreme Court has already decided and directed and is therefore of the class of cases which this Court will customarily review.

2. The decision of the Court below is predicated on an erroneous conclusion carried over from the old case and is in disregard of the new cause of action created by the Special Act.

3. The proper interpretation of an Act of Congress and the enforcement of a mandate of this Court are questions of public importance. Both questions are here involved.

Conclusion

The assigned errors and reasons for granting the writ asked will be discussed briefly in a brief accompanying this petition.

George Robert Shields,
Counsel for Petitioner.

Herman J. Galloway,
John W. Gaskins,
Fred W. Shields,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 520

ALLEN POPE,

Petitioner,

vs.

THE UNITED STATES,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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1. Assignments of Error

(a) *The Court of Claims Has Misinterpreted the Special Act of February 27, 1942, and Has Not Complied With the Mandate of This Court.*

The Special Act of February 27, 1942 (R. 1), is specific in directing the Court of Claims "to determine and render judgment at contract rates" upon the claims of petitioner "for certain work performed for which he has not been paid, but of which the Government has received the use and benefit, namely, * * * for the work of excavating materials which caved in over the tunnel arch * * *."

Although the Court of Claims finds (Finding 8) that "all of the work", including excavation of materials which caved in from over the tunnel arch, "was useful and beneficial to the Government" and "none of it has been paid for", it has concluded that because petitioner was not entitled *under the contract involved in the original suit* to pay as for excavating materials caving in from above the tunnel arch, he is not entitled to such pay *under the Special Act*. How or why it arrives at this incongruous determination is difficult to understand but is apparently for one or all of three reasons. It says:

(R. 73). "First. * * * If the plaintiff (petitioner) urged upon Congress any claim based on these matters there is no intimation, either in the special act or the committee reports that Congress intended to create, for the plaintiff, rights to recover for them."

(R. 73). "Second. * * * Yet the obvious purpose of the special act was to create specially for the plaintiff, such rights as a correct decision *under the general law*, or a decision under law which accorded with good morals, if the general law did not, would have given him." (Italics added.)

(R. 75). "Third. * * * We think that in fact he had no intention of making such a claim to Congress, and that we have no right to seize upon the words 'contract rates' used in the statute, search the contract for a rate, and apply it to work which the contract itself expressly said, and the plaintiff repeatedly said, carried no separate rate of compensation at all. * * *." "There could be no possible equity in his claim for separate compensation for excavation, or for damages, because, *as to the estimated amount*, he knew he would have to remove it and the contract expressly said that he would not be separately paid for doing so. * * *" (Italics added.)

(R. 83). "When we so interpret the special act as to make the plaintiff's former claims and testimony, his former failure in this court, his statement to Congress, the report of the Committee, which that statement induced, and the spe-

cial act, as one consistent whole, we have no doubt that we are giving to the plaintiff the full measure of relief which Congress intended him to have."

In other words, the Court has concluded that because plaintiff had in the old suit not specifically claimed as for excavating materials caving in from outside the "B" line over the tunnel arch; because in his statement to Congress based on claims upon which he then asked relief, he did not, allegedly, describe the work of excavating caved-in materials (but as to this see the facts as thoroughly reviewed in dissenting opinion by Littleton, J., concurred in by Whitaker, J. (R. 84-110); see for legislative history, Appendix hereto; and because the Committee of Congress in making its report preceding the enactment of the Special Act did not in terms allude to the extra work incident to the excavation of caved-in materials, then Congress could not have meant what it said when it directed the Court of Claims to hear and determine the claim for "excavating materials which caved in over the tunnel arch", when if such work was found to have been performed, to have been beneficial to the Government and never paid for. The Court has found that the work was performed; that it was beneficial to the Government; and that it has not been paid for, but it disallowed the claim "for the work of excavating materials which caved in over the tunnel arch" notwithstanding.

Petitioner says that this is a serious misinterpretation of the meaning of the Act and of the reasons therefor. It is quite true petitioner did not in his original suit assert as a separate item of claim a claim for excavating and removing materials which caved in from above the tunnel arch. He did assert a larger claim for the extra expense incident to excavating the tunnel through caving materials where stable materials were shown on the drawings as to be

expected (see facts as reviewed by Judges Littleton and Whitaker, R. 84-110). The Court in the old case disallowed that claim. In going to Congress petitioner asked for the contract price for excavating the caved-in materials. Congress saw the merits of the claim and provided that the Court should adjudicate the same. The same proof that established the quantity of dry pack and grout establishes with equal certainty the quantity of materials which caved in from the space filled by dry pack and grout.

The Court below makes much of the fact that the old contract fixed no contract price *per se* as for excavating from outside the "B" line. This is true. It is true also of the materials which caved in from beyond the "B" line of the side walls which is here allowed at the "contract rate." The *contract* no more fixes a price for excavating side wall cave-ins from beyond the "B" line than it does for excavating cave-ins from over the tunnel arch, but the *Special Act* fixes a price—contract rate for excavation—for both. If the Act warrants the allowance of contract rates for excavation of cave-ins from the side walls—and the Court finds that it does—it would surely seem that it equally authorizes payment at contract rates for excavation of materials caving in from overhead. Both excavations were of materials coming from outside the "B" line.

In any event, this is not now a suit under the contract. It is a suit under the Special Act, on a cause of action created by the act. The Court below by applying the contract and what happened in suit thereon has misinterpreted the meaning and effect of that act, and this Court alone can correct the misinterpretation.

This Court when the case was previously before it said (323 U. S. 1, 9):

> "The Special Act did not purport to set aside the judgment or to require a new trial of the issues as to the validity of the claims which the Court had re-

> solved against petitioner. While inartistically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before."

And again (p. 10):

> "Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal."

The mandate of the Supreme Court directs the Court of Claims to take "further proceedings in conformity with the opinion of this Court."

It would seem that the present judgment of the Court of Claims is not in conformity with the principles enunciated in the decision of this Court or in compliance with the mandate. As before stated, the Court of Claims persists in determining the item of claim now in question on the basis of the contract in suit in the old case and what happened in the proceedings thereunder.

(b) *Because Petitioner Was Not in the Old Case or Now Entitled to Pay for Excavating Materials as a Contract Right Is No Reason Why, Under the Act, Claim for Pay for Such Work Is Precluded.*

The action of the Court of Claims in disallowing claim "for the work of excavating materials which caved in over the tunnel arch" is largely and basically predicated on the fact that Pope, the petitioner, did not in the old case under the contract make such claim.

This is true, but immaterial. As a matter of contract right he had no such claim. The present claim is not made *under the contract* but *under the Special Act.* The question, therefore, is not whether the claim is warranted

by the contract or by general law, but whether same is validated *by the Special Act.* The Court by a confusion of issues has lost sight of the true one.

The Court dwells much on certain phases of the old case:

(1) That Pope did not there claim as for excavating caved-in materials;

(2) That he there conceded that the contract gave him no pay, fixed no price, for excavation beyond the "B" line;

(3) That his compensation for excavating from beyond the "B" line was in the price he would get for dry-packing and grouting spaces created by such over-breakage, etc., and

(4) That the contract fixes no price for excavating materials from beyond the "B" line.

There is a ready answer to each of these propositions:

(1) He did not in the old case claim as for excavating materials caving in from over the tunnel arch. He did there claim and prove that the cave-ins were the result of encountering soft, seamy rock where "hard rock" was shown on the drawings, and that the refusal of the contracting officer to permit timbering support that would have prevented substantially all caving in of materials as the tunnel excavation proceeded was primarily responsible for the cave-ins.

(2) The contract was specific that excavation from beyond the "B" line would not be paid for but no such excavation was done. Materials did cave in from outside the "B" line and had to be removed, not from *above* but from *within* the "B" line.

(3) He did say that for the normal, expected small (500 cubic yards) amount of over-breakage from beyond the

"B" line, under the contract representations, he expected to find his pay in what he would get for dry-packing and grouting outside the "B" line. But the cave-ins were many times the estimated 500 cubic yards of overbreakage—5,561 cubic yards of space created by cave-ins were actually filled with dry-pack, and a much larger space, likewise created, was filled with *earth from the surface*, for which no claim is made because the yardage thereof cannot now be determined. Certainly, the price now belatedly allowed for dry pack and grout would not include any pay for the great mass of materials which actually caved in, all of which were required necessarily to be excavated and removed.

(4) The contract fixed no price—it barred payment—for excavation from beyond the "B" line. All the materials caving in—those from the *side walls* as well as those from *over the tunnel arch*—were from *outside the "B" line.* For their excavation the *contract* fixed no price. But the *Act* does fix a price, namely the "contract rate" for excavation. For excavation of materials caving in from the side walls, the Court complies with the Act and allows payment at the contract rate for excavation, but for excavation of materials caving in from above the tunnel arch, it, not very consistently, says the Act fixes no rate. Surely this can only be the result of misinterpreting and failing to apply the plain intent of the Act.

(c) *Is It True That Neither the Committee Reports Nor the Special Act "Intimates" an Intent by Congress to Create for Petitioner a Right to Recover for the Work of Excavating Materials Caving in from Over the Tunnel Arch?*

The Court of Claims says that it is. Petitioner says that nothing could be farther from the truth. The legislative record (see Appendix hereto) shows that petitioner

claimed this before Congress; the bills introduced and the Committee reports show it and the Act itself is plain and unambiguous in sanctioning its allowance (see dissenting opinion, R. 84-110). The Court below would appear to have ignored all this.

(d) *Judgment Should Have been Rendered in Petitioner's Favor for All Claims Listed in the Act, Including That "for Work of Excavating Materials That Caved in (from) Over the Tunnel Arch."*

If petitioner's understanding of the Act is correct it is obvious that the Court below has wandered far afield in its interpretation thereof and has misconceived and misapplied what Congress intended.

2. Reasons for Granting Writ

The reasons for granting the writ asked would seem to be sufficiently stated in what has been said under Assignments of Error.

It is respectfully submitted that the petition should be allowed and the judgment of the lower Court reviewed.

George Robert Shields,
Counsel for Petitioner.

Herman J. Galloway,
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Of Counsel.

APPENDIX

Legislative Record

Being Copies Seriatim of Eight Bills and One Act in Congress

(56 Stat. 1122)

Modifications from one bill to another indicate the intent and barter of the petitioner and the law-making branches of the Government, the Congress and the Executive, apropos the ruling of the Court of Claims that there was no intention to include in the Special Act the item for the work of excavating material which caved in over the tunnel arch.

1st Bill, 1/20/38.

This bill purported to base liability on the contract of December 3, 1924, as if the court had granted the fourth motion for a new trial, i.e., for all items originally claimed.

75th Congress, 3d Session — H. R. 9082.

In the House of Representatives

January 20, 1938

Mr. Palmisano (by request) introduced the following bill; which was referred to the Committee on Claims and ordered to be printed

A Bill

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of Allen Pope against the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment upon, notwithstanding the lapse of time or any provision of law or rule of the court to the contrary, the claim of Allen Pope, District of Columbia, for damages arising from a contract dated December 3, 1924, between the United States and the

said Allen Pope for the construction of a tunnel in the District of Columbia. The Court of Claims shall hear, determine, and render judgment upon such claim in the same manner as if the court had granted the fourth motion of the said Allen Pope for a new trial (following the decision of the court on March 7, 1932, of the case of Allen Pope against The United States), such motion being overruled by the court on December 6, 1937, on the basis of lack of jurisdiction. Such suit shall be brought within one year from the date of enactment of this Act. Review of such judgment may be had, by either party, in the same manner as is provided by law in other causes in such court.

Sec. 2. There is authorized to be appropriated such sum as may be necessary to pay the amount of any judgment rendered pursuant to this Act.

2nd Bill, 2/7/38.

This bill is identical with the foregoing except, having been introduced in the Senate, the heading is:

75TH CONGRESS, 3d Session — S. 3406.

IN THE SENATE OF THE UNITED STATES

January 5 (calendar day, February 7), 1938

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

3rd Bill, 1/17/39.

This bill, except for the heading, is identical with the foregoing, the bill having been reintroduced in the new Congress. The heading is:

76TH CONGRESS, 1st Session — S. 744.

IN THE SENATE OF THE UNITED STATES

January 17, 1939

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

4th Bill, 7/27/39.

This bill discards the contract as cause of action and purports to create new liability but only for three items of claim.

No item for excavation of materials caved in from over the tunnel arch is included in this bill.

The bill is:

76TH CONGRESS, 1st Session — S. 2906.

IN THE SENATE OF THE UNITED STATES

July 27 (legislative day, July 25), 1939

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

A Bill

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of Allen Pope against the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, any provisions of the contract, purported release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope against the United States, arising out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

Sec. 2. The Court of Claims is hereby directed to determine and render judgment upon his claims for (1) the amount of dry packing and grouting supplied and used by the said Pope in the construction of said tunnel, for which dry packing and grouting the said Pope has not been paid; and (2) the damages and extra costs incurred by the said Pope in complying with certain orders of the contracting officer, which orders were in excess of any authority con-

ferred by the contract and which so changed the plans for the work as to lower the upper "B" or "pay" line 3 inches, and also required the omission of timber lagging from the side walls.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit, together with any additional evidence which may be taken therein, any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, Numbered K-366, in the Court of Claims.

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

5th Bill, 4/10/40.

Observe in this bill the following:

(1) It provides for payments at the "contract rates."

(2) It adds provision "for the work of excavating materials which caved in over the tunnel arch."

(3) It further provides for use of the "liquid method" of measurement of spaces.

(4) In the title it adds the letter "s" to the word "claim" thus making it plural and reading "claims of Allen Pope".

The bill reads:

76TH CONGRESS, 3d Session — S. 3751.

IN THE SENATE OF THE UNITED STATES

April 10 (Legislative Day, April 8), 1940

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

A Bill

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope against the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope against the United States, arising out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

6th Bill, 8/6/40.

This bill added the clause in section 1, "as described and in the manner set out in section 2 hereof." Otherwise it is the same as the foregoing. As here drafted the bill is the same as that ultimately enacted.

76th Congress
3d Session S. 4243

IN THE SENATE OF THE UNITED STATES

August 6 (Legislative Day, August 5), 1940

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

A Bill

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Poe, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

7th Bill, 1/23/41.

This bill was the same as the foregoing except that having been introduced in a new Congress, the number and caption were changed accordingly. The heading is:

77th Congress
1st Session S. 531

IN THE SENATE OF THE UNITED STATES

January 23, 1941

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

---

8th Bill, 3/25/41.

This was companion bill in the House with the foregoing Senate bill and is identical with the two preceding bills. The heading is:

77th Congress
1st Session H. R. 4179

IN THE HOUSE OF REPRESENTATIVES

March 25, 1941

Mr. Healey introduced the following bill; which was referred to the Committee on Claims

---

An Act, 2/5/42.

This Act, which passed the House July 15, 1941, passed the Senate February 13, 1942, and was approved by the President February 27, 1942. It is the same as the three preceding bills above listed. Its full terms were before Congress from August 6, 1940 to February 13, 1942. The Act is reproduced in full in several places in the record. The heading is:

77th Congress Calendar No. 1053
2d Session H. R. 4179
[Report No. 1019]

IN THE SENATE OF THE UNITED STATES

July 17, 1941

Read twice and referred to the Committee on Claims

February 5 (Legislative Day, February 2), 1942

Reported by Mr. Hughes, without amendment

An Act

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

The afore-mentioned Report No. 1019 of the Senate Committee on Claims is set out below in toto. Portions thereof, relating expressly to the item of excavating materials which caved in from above the tunnel arch, here to be noted are:

(1) Under the caption, "Statement of Facts", post 25, 1st par., 2nd sentence, observe the phrase, "namely certain excavation * * *".

(2) Under the caption, "Present Bill is only remedy", post 27, 1st par., 2nd sentence, note the clause, "and because it did not allow him *other items of work* which he performed but *for which he was not paid,* * * *" (italics added). This refers to Section VI thereafter (post 38) the title of which is "VI. Other Items of Work for Which Claimant Has Not Been Paid." See note (6) below.

(3) Under the caption, "Report of Attorney General follows:" post 28, observe the first two sentences in paragraph 2, post 30, especially the second sentence in which the Attorney General paraphrases the language of the Act:

> Section 2 of the bill would direct the Court of Claims to determine and render judgment on certain claims of Pope for "work performed for which he has not been paid, but of which the Government has received the use and benefit." This work is described as certain excavation and concrete work performed pursuant to

change orders *and the excavation of caved-in places* and the filling of such caved-in places with dry packing and grout. (italics added).

(4) Under the caption, "III. The Contract Project", post pp. 32-33, observe that this section relates principally to the representations and warranty made in the contract as to the geological formations explored by the Government and planned for by the Government. These representations were the basis of petitioner's prior suit for alleged misrepresentation, 76 C. Cls. 64; 81 C. Cls. 658; 86 C. Cls. 18. They are set out in the Report as background or conditions precedent to the statements to follow in Section IV.

(5) Under the caption, "IV. Conditions in Performance Giving Rise to Claims", post 33, observe that virtually all of this Section IV relates to the fact of roof cave-ins and the ensuing costs.

> The roof of the excavation caved in for the full length of the tunnel, 3543 feet. * * *
>
> Obviously, therefore, the items of expense which the contractor did incur had not been anticipated to such an extent by the Government or by the contractor; *these items were the cost of removing all caved-in materials from the tunnel,* * * * (italics added).

(6) Under the caption, "VI. Other Items of Work for Which Claimant Has Not Been Paid", post 38, observe Note (2) hereinabove wherein was indicated that the Committee on Claims referred especially to this Section VI, the opening part of which refers to the excavation of the caved-in materials as follows:

> VI. Other Items of Work for Which Claimant Has Not Been Paid
>
> The court further found that the cost of excavating the tunnel was materially increased to the contractor, because he encountered much material that was soft, seamy rock, and running earth, "materials contrary in formation from what he expected to encounter" (Finding XIV, R. 673, Decision, p. 11). *As the result of this*

condition, he was required to excavate materials which caved in over the tunnel arch, * * * (italics added).

The full text of Report No. 1019 follows:

CALENDAR No. 1053

77th Congress, 2d Session

Senate Report No. 1019

ALLEN POPE

February 5 (legislative day, February 2), 1942—Ordered to be printed

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MR. HUGHES, from the Committee on Claims, submitted the following

REPORT

[To accompany H. R. 4179]

The Committee on Claims, to whom was referred the bill (H. R. 4179) to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

The facts are fully set forth in House Report No. 865, Seventy-seventh Congress, first session, which is appended hereto and made a part of this report.

[H. Rept. No. 865, 77th Cong., 1st sess.]

The Committee on Claims, to whom was referred the bill (H. R. 4179), to confer jurisdiction upon the Court of

Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

Statement of Facts

The purpose of the bill is to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon certain claims of Allen Pope, arising out of his construction of a tunnel for the extension of the water-supply system of the District of Columbia. The bill limits the jurisdiction of the court to certain items of work performed by the said Pope in complying with orders of the contracting officer, for which items he has not been paid, but of which the Government has received the use and benefit, namely certain excavation and concrete work and filling in caved-in spaces with dry packing and grout. Payment to the said Pope by the court would be at the rates provided in the contract.

The report of the Attorney General of the United States upon this bill is attached hereto and made a part of this report. Without making any recommendations as to the proposed legislation, the Attorney General stated:

"Whether or not the bill should be enacted is a question of legislative policy as to which I prefer not to make any suggestions."

It should be noted, however, that the Attorney General's report, in referring to section 2 of the bill and the items or claims to be considered by the court, states that certain of these claims were denied by the Court of Claims "on the ground that the change orders were not in writing as required by the contract." The Attorney General stated that section 2 "in effect would waive the contract requirements that change orders be in writing."

It was the contention of the claimant, Allen Pope, before your committee that the Court of Claims had erred in its decision in this regard, because as a matter of fact the change orders of the contracting officer were in writing as required by the contract, and hence the bill does not, as

the Attorney General stated, waive the contract requirements that change orders be in writing. Claimant contended, therefore, that the bill is necessary to enable the court to correct its error and to enable him to recover, only at contract rates, the value of the work performed by him pursuant to duly authorized orders of the contracting officer, all of which work was inspected and accepted by the Government inspectors, but for none of which has he been paid.

Error of the Court

Your committee have fully examined the contentions of the claimant, and the copies of original exhibits filed by him in the Court of Claims. It is the judgment of your committee that claimant is correct in his contentions that the change orders were in writing, that the contract requirements were met and the bill does not waive any contract requirements "that change orders be in writing," as the Attorney General states. Claimant having duly complied with, and having required the contracting officer to comply with, the terms of the contract in this respect, he is entitled to present his claim again to the court in order to enable it to correct its error.

That the change orders were in writing, is clearly established from the contract drawings and other exhibits filed in the court. The original drawings show the tunnel section as it should appear in the course of construction, and such original drawings were supplied claimant upon his commencement of the work. Subsequently, revised contract drawings were submitted to him, showing thereon, in writing, certain revisions, as well as appropriate changes in the sketch of the tunnel section thereon. Finally, such revised contract drawings were transmitted to the claimant by letter from the contracting officer, dated July 23, 1925. These drawings and exhibits are referred to in detail in the "Statement of Allen Pope," attached hereto and made a part hereof.

Manifestly, the court erred in finding that these change orders were not in writing, and the Attorney General likewise erred in making the same statement.

Present Bill is only remedy available to Claimant

Enactment of the pending bill is necessary to afford relief to claimant in this regard. Because of the error of the court, and because it did not allow him other items of work which he performed but for which he was not paid, claimant endeavored, through five motions for new trial, to have his case reopened and readjudicated by the court. The court overruled these motions, and the court's position, as to its lack of jurisdiction to reopen the case was fully stated on December 6, 1937 (when overruling his fourth motion for new trial), as follows:

"We discussed in 81 Court of Claims 658 our inability to grant the new trial asked for, and we are convinced now, as we were then, that the court is without jurisdiction to grant a new trial. The issue of jurisdiction is the vital one now before the court. * * *

"*The remedy available to plaintiff*, in our view of the present status of the record, *resides exclusively in Congress*, and in Congress alone. The court is without jurisdiction to grant plaintiff's motion, and it is overruled." [Italics added.]

Pursuant to the suggestions of the court, the claimant has had legislation introduced, in order that he may endeavor to secure relief by having certain of his claims readjudicated by the court. There is no questioning the fact that he was put to additional items of expenses by reason of the change orders of the contracting officer; that the claimant did supply certain dry packing (stones put into place) and grout (liquid cement mortar pumped into the spaces between the dry packing); that this was done under orders and supervision of the contracting officer; and it was accepted by the Government inspectors after inspection thereof.

The reported bill would enable the court to correct its error; reimburse him for the expenses to which he was put as the result of the change orders; determine the amount of dry packing "by the liquid method as described by the court and based on the volume of grout actually used;" and determine the amount of grout supplied as established "by the

court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing."

Conclusion

Reference of this matter again to the court seems only just and equitable in order to obviate a hardship which was imposed upon the contractor. Only in this way can the Congress enable the court to rectify its own mistake and compensate the claimant for materials and labor which he furnished to the Government, which were necessary in the construction of the tunnel, which the contracting officer directed to be supplied, of which the Government has received the benefit and use these many years, and yet for none of which has the claimant been paid. Enactment of H. R. 4179 is therefore recommended by your committee.

Report of the Attorney General follows:

Office of the Attorney General,
Washington, D. C., April 28, 1941.

Hon. DAN R. MCGEHEE,
Chairman, Committee on Claims, House of
Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN:

This acknowledges your letter of April 15, 1941, requesting my views relative to a bill (H. R. 4179) to confer jurisdiction on the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States arising out of a contract made by him with the United States for the construction of a tunnel to carry a part of the water supply for the District of Columbia.

The files of this Department show that on December 3, 1924, Allen Pope entered into a contract with the United States to construct a tunnel to carry a part of the water supply for the District of Columbia. The work was completed on July 14, 1927, approximately 7 months after the date fixed by the contract.

On August 23, 1929, Pope filed suit in the Court of Claims for additional expenses alleged to have been caused by

changes made by Government officers in the specifications; expenses caused by alleged unwarranted interference with the contractor in the performance of the work; and cost of additional material used in excess of that contemplated by the contract. The amount claimed was $306,825.33. Testimony was taken at great length. The case was submitted to the court on voluminous briefs and oral arguments. The court passed on the merits of the claim and, on March 7, 1932, rendered judgment in favor of the claimant in the sum of $45,174.46 (*Pope* v. *United States*, 76 C. Cls. 64).

The court denied recovery on the items of expense resulting from change orders on the ground that such orders were not in writing as required by the contract.

On May 6, 1932, the plaintiff filed a motion for a new trial, which was denied on June 5, 1933. Thereafter, on August 2, 1933, the plaintiff filed a motion for leave to file a second motion for a new trial. This motion was overruled on August 15, 1933. Subsequently, on May 7, 1935, the plaintiff sought leave to file a third motion for a new trial. Such leave was granted. On June 10, 1935, the court overruled the plaintiff's third motion for a new trial, holding that "a motion for a new trial after expiration of the term when the judgment became final may not be allowed unless it appears that the judgment resulted from imposition and fraud upon the Court" (*Pope* v. *United States*, 81 C. Cls. 658).

On July 15, 1935, the Government paid the plaintiff the sum of $45,174.46 awarded him by the judgment of the Court of Claims.

Subsequently, however, on September 27, 1937, the plaintiff sought leave to file a fourth motion for a new trial. This leave was granted and, on December 6, 1937, the court overruled the motion for a new trial on the ground that it was filed after the expiration of the term in which the judgment became final.

Thereafter, on March 4, 1938, the plaintiff filed a petition in the Supreme Court for a writ of certiorari to review the judgment of the Court of Claims. This petition was denied on March 28, 1938 (303 U. S. 654).

The bill under consideration proposes to confer jurisdiction on the Court of Claims to hear and determine the claims of plaintiff "notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance" in the manner set out in section 2 of the bill.

Section 2 of the bill would direct the Court of Claims to determine and render judgment on certain claims of Pope for "work performed for which he has not been paid, but of which the Government has received the use and benefit." This work is described as certain excavation and concrete work performed pursuant to change orders and the excavation of caved-in places and the filling of such caved-in places with dry packing and grout. When the claim in respect of these items was originally presented to the Court of Claims, the court said: "The changes involved were clearly changes which under contractual procedure would have been ordered and paid for accordingly; they were alterations clearly contemplated by the contract and not of a character either in scope or extent as to fall without the contemplation of the parties in making the contract." The court also found that as a result of the above-mentioned change orders, the plaintiff incurred an additional expense of $10,427. Recovery was denied, however, on the ground that the change orders were not in writing as required by the contract.

This section in effect would waive the contract requirements that change orders be in writing and would permit the claimant to recover at contract rates the value of the work performed as a result of the above-mentioned change orders.

Whether or not the bill should be enacted is a question of legislative policy as to which I prefer not to make any suggestions.

Sincerely yours, Robert H. Jackson, Attorney General.

STATEMENT OF ALLEN POPE

I. Necessity of Legislation

The enactment of the pending bill is urged and is necessary because of the fact that the claimant cannot have his

case heard or readjudicated in the Court of Claims unless the Congress grants the court jurisdiction to consider the same.

The facts are that the claimant has availed himself of every remedy at law before coming to the Congress. The Comptroller General did not allow full payment to Pope, after the completion of the tunnel, for the services he had performed and for the materials he had supplied. Therefore, he filed suit in the Court of Claims. When that court handed down its decision and failed to render complete judgment on all the claims presented by him, he endeavored, through five motions for new trial, to have the case reopened and readjudicated by the court. But the court considered itself without jurisdiction to hear his case further and dismissed his motions. The inability of the court to reopen the case was stated by the court on December 6, 1937, when overruling his fourth motion for new trial. The Court stated:

"We discussed in 81 C. Cls. 658 our inability to grant the new trial asked for, and we are convinced now, as we were then, that the court is without jurisdiction to grant a new trial. The issue of jurisdiction is the vital one now before the court. * * *

"*The remedy available to plaintiff*, in our view of the present status of the record, *resides exclusively in Congress*, and in Congress alone. The court is without jurisdiction to grant plaintiff's motion, and it is overruled." [Italics added.]

The claimant is not asking the Congress to grant him relief by paying him the amount he claimed before the court. All he is asking is that the Congress, which alone has jurisdiction, direct the court to consider the case again and grant him relief as was denied him heretofore, and give him judgment whereby he can, in a measure at least, be reimbursed expenditures to which he was put in building the tunnel, as to the facts of which there is no doubt, since they are of evidence in the record, and for which the Government has received the benefit, but for the greater part of which claimant has never been paid.

Hence, it is pursuant to the very suggestions made by the court itself, both in its printed decision of December 6, 1937,

and in its advices from the bench when the claimant appeared there with his last motion for new trial, that claimant now seeks relief through an act of the Congress which will confer upon the court jurisdiction to readjudicate his case.

II. The Contract

The pending claim arises out of performance under a contract which was made on December 3, 1924, by the United States, acting through officers of the Army Engineer Corps, with Allen Pope, a citizen of the United States, for the construction of a tunnel for the extension of the water-supply system of the District of Columbia. The contract was a unit-price contract, as distinguished from a lump-sum contract. The work to be done was divided into 10 different items. Payments were to be made on the basis of the unit prices bid for the various items and for as many units of work as were required to complete the project, irrespective of the quantities estimated in the specifications.

III. The Contract Project

The tunnel required to be constructed was a subterranean excavation, approximately straight and level, about 10 feet in diameter and 3,543 feet long. Its depth below the surface varied from 40 to 90 feet, according to the contour of the ground. The excavation was to be supported or braced with timbers where necessary and was to be lined throughout with concrete so that, when completed, the finished inside surface—6 feet in diameter—was smooth concrete.

The Government prepared the contract plans and indicated thereon certain representations as to the character of underground geological formations disclosed by the test borings made by the Government. The specifications warranted the descriptions given. The specifications also provided that when, during excavations, the ground caved in over the crown of the tunnel arch, such caved-in spaces were to be refilled with stones packed in place, called dry packing, and that the voids or spaces between such stones should be thoroughly filled with liquid cement mortar pumped into place. This cement mortar was to be made of specified

proportions of sand, cement, and water, and was termed "grout."

As stated, the work to be done in excavating and constructing the tunnel was divided into 10 items. The 5 principal items, which subsequently became involved in the issues of Pope's case in the Court of Claims, were (1) excavation, (2) timber, (3) concrete, (4) dry packing, and (5) grout. (The designating numbers are those appearing in the contract.)

The Government's estimate of quantities, upon which the contract was predicated and bids compared for award, was based upon the geological representations given on the contract drawing, which showed that the ground throughout the tunnel length would be substantially solid rock. However, the contract provided that as many units of work be supplied and payments made therefor as the exigencies of actual ground conditions imposed. To this end, payments were to be made on the basis of unit prices rather than, or as distinguished from, a lump sum for the whole work. The Government, in addition to warranting its descriptions of geological formations disclosed by its test borings drilled on the site of the proposed tunnel, obligated itself to give all lines and grades for the performance of the work, to measure and make a record of all completed work, and to pay therefor on the basis of the contract unit prices. It was agreed that the work should be completed within 2 years, or by December 4, 1926.

IV. Conditions in Performance Giving Rise to Claims

During performance of the excavation, the character of the geological formation actually encountered by the contractor proved to be much different from that described on the Government's plans. Instead of solid rock, as thereon depicted, standing in place when tunneled into, the ground was wet, running earth, or soft, seamy, loose, unstable formation which caved in. The roof of the excavation caved in for the full length of the tunnel, 3,543 feet. This is in striking contrast to the contract drawing prepared by the Government, which shows the entire tunnel lying in a

region of rock with more than 95 percent of it designated on the drawing as "hard rock".

As a consequence of such conditions which could not have been anticipated from the contract drawings, it was necessary for the contractor to perform far more units of work than the Government had anticipated. For example, large portions of the excavation had to be timbered, and this meant that the cross section had to be enlarged to accommodate the timbers. Thus, more excavation resulted than had been expected. Next, the caved-in spaces had to be refilled with dry packing and grout, which meant the use of more rocks and more concrete than had been anticipated. In fact, the amounts of timber, dry packing, and grout employed by the contractor, as directed, amounted to more than 10 times the Government's contract estimate. (Court findings III, VI, VII, R. 663-70.)

Obviously, therefore, the items of expense which the contractor did incur had not been anticipated to such an extent by the Government or by the contractor; these items were the cost of removing all caved-in materials from the tunnel, the cost of bracing and supporting the excavation with timber, and the cost of refilling the caved-in spaces with the specified dry packing and grout, together with the expense caused by prolongations or by changes of methods of operations imposed by errors, and reversal of decisions by the contracting officers.

That, in a single sentence, is the substance of claimant's case. Insofar as the Government failed to pay for contract work which was necessary, which it directed to be done, and the benefit of which the Government has received, and insofar as its errors and interferences caused damage or otherwise unnecessary expense to the contractor, he now asks redress through such relief as the court may grant him.

V. Court Exhibits Establishing Claim Resulting from Changes in Contract Plans

Claimant respectfully requests the Claims Committee to consider certain exhibits filed by him in the Court of Claims,

and which exhibits he offers in support of his request for the enactment of the pending bill. Claimant believes that the following are established by these exhibits: (*a*) The court erred in its decision that the changes in the contract work, which were ordered by the contracting officer and which resulted in increasing the cost of the work to the contractor, were not in writing. The fact is that such changes were ordered in writing, as shown by reference to the contract drawings and specifications and letter of the contracting officer hereinafter quoted. (*b*) The court erred in its decision that the provisions of the contract and specifications were not complied with as to procedure in making changes. The fact is that the contracting officer was within his authority in making the changes he did and in ordering them as he did. They were minor modifications in the contract work which he had authority individually to make. (*c*) The court correctly determined that claimant was put to additional items of expense by reason of these changes and that the cost of the work was thereby increased. Yet claimant has not been paid for such work, nor for certain materials he supplied at the order of the contracting officer, and of which the Government has received the use and benefit.

The exhibits referred to are as follows:

1. *Plaintiff's exhibit A—Contract.*—The contract provisions as to "Material changes in the contract" are set forth in article 7 of the contract, as follows:

"ART. 7. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers. * * *"

2. *Plaintiff's exhibit A—Specifications.*—The specifications, which formed a part of the contract, provide for "Minor modifications" in paragraph 30 thereof, as follows:

"30. *Minor modifications.*—The contracting officer reserves the right to make any additions to, omissions from, or alterations in the work as described in these specifications and shown on the drawings referred to in paragraph 29, whenever he shall deem such additions, omissions, or alterations necessary or desirable, provided that the sum total of all such additions to or subtractions from the contract plans amount to less than 10 percent of the total amount of the contract price."

3. *Contract provisions as to drawings.*—Paragraph 29 of the specifications (also exhibit A) requires that the contract work should conform to drawings furnished by the Government. The contracting officer also was authorized to furnish such detail drawings as he considered necessary to amplify and explain the contract drawings. Further, he was authorized to correct any errors or omissions in the drawings or specifications, "and his decision in such cases shall be final and binding."

4. *Original contract drawing No. 2.*—This drawing (plaintiff's exhibit No. 1, pt. 2, sheet 2) is entitled "Typical Sections and End Structures." It includes a sketch of a tunnel section on which is depicted the upper B or pay line. The contractor was paid for work up to, but not beyond, the limits of this B line. The same sketch of the tunnel section in this drawing also shows the timber lagging used on the side walls of the tunnel. Lagging consisted of heavy planks placed longitudinally against the walls, a kind of wooden fence, to prevent the side walls of the excavation from caving in.

5. *Revised contract drawing No. 2.*—This drawing (plaintiff's exhibit No. 1, pt. 3, sheet 2) is a blueprint of the tunnel project. It is identical to the original contract drawing, except as to three revisions or changes which are not only marked thereon in writing but also are shown by changes made in the sketch of the tunnel section itself.

"Revision No. 1" appears in writing on this revised drawing as "Revision No. 1. Timbering of tunnel at top of arch lowered 3 inches." Then, on the sketch of the tunnel section itself is shown the timber lowered at the top of the tunnel, resulting in lowering the B or pay line 3 inches below where it appeared on the original contract drawing.

"Revision No. 3" appears in writing on this same revised drawing as "Revision No. 3. Three-inch lagging on side of timbered section removed." Then, on the sketch of the tunnel section is shown concrete to be used on the side wall of the tunnel, in place of timber lagging shown and required by the original contract drawing.

6. *Letter of contracting officer—Plaintiff's exhibit 28.*—

WAR DEPARTMENT,
UNITED STATES ENGINEER OFFICE,
July 23, 1925.

Mr. ALLEN POPE,
Washington, D. C.

DEAR SIR: Herewith find four prints of our drawing No. 2 revised July 21, 1925. This revision is made in accordance with the provisions of paragraph 29 of the specifications and shows the removal of the lagging on the side of the timbered section of the tunnel.

Very truly yours,

J. A. O'CONNOR,
Major, Corps of Engineers,
District Engineer.

7. *Summation of exhibits.*—There seems no question but that the change, whereby Pope was put to the expenses he claimed and for which he has never been reimbursed, did conform to the requirements of the contract and specifications. The changes referred to were not material changes which, under article 7 of the contract, had to be agreed upon in writing and, in addition, had to be approved by the Secretary of War. These changes were minor modifications, contemplated and covered by paragraph 30 of the specifications

which formed a part of the contract, and which reserved to the contracting officer authority individually to make such changes in writing when the said changes amounted to less than 10 percent of the contract price. Much less than 10 percent of the contract price is involved in the changes which were made. Therefore, the modifications or changes ordered by the contracting officer were clearly within the authority given him by the contract. The revised contract drawing on which these changes were noted in writing, and also sketched thereon, and the letter of the contracting officer to Pope, forwarding the revised contract drawing, obviously conformed to the requirement that "changes will be ordered by the contracting officer in writing." The court, manifestly through error, denied Pope payment for those items of work resulting from these changes.

VI. Other Items of Work for Which Claimant Has Not Been Paid

The court further found that the cost of excavating the tunnel was materially increased to the contractor, because he encountered much material that was soft, seamy rock, and running earth, "materials contrary in formation from what he expected to encounter" (Finding XIV, R. 673, Decision, p. 11). As the result of this condition, he was required to excavate materials which caved in over the tunnel arch, and then to fill the caved-in spaces with dry packing (stones put into place) and grout (liquid cement mortar which was pumped into the spaces between the dry packing, thus consolidating the whole into a solid mass). This was done at the direction of the contracting officer. See, for example, the findings of the court showing contract drawing entitled "Construction in untimbered sections" (pl. II, R. 665, Decision, p. 3) and the statement of the court in explanation thereof:

"The roof, rotten seamy rock, caved in for entire length of 2,000 feet. The concrete arch lining was built to the B line. The space over the arch outside of the B line was required to be filled with dry packing, and, by direction of the Chief of Engineers on plaintiff's appeal, was required to be

grouted full. No payment has been made for any of the dry packing nor grout thus required to be used."

Also, see court findings and contract drawing entitled "Construction in timbered sections" (pl. III, R. 666, Decision, p. 4) and the statement of the court in explanation thereof, as follows:

"All spaces over the arch, including cave-ins outside of the B line vertically extended as at 'X', and 'above elevation 325' as at 'Y', were required to be dry packed * * *.

"The second officer permitted grouting only to the 6-inch level but later, by direction of the Chief of Engineers on plaintiff's appeal, he required the entire space to be grouted. Payments made only in part and not based on measurements."

There is no questioning the fact that Pope did supply dry packing and grout for which he has not been paid. The court, in its decision on this point, stated:

"The next item in suit is for dry packing the spaces over the crown of the tunnel arch. The plaintiff, as we have previously observed, claims he dry-packed a total area of 5,561 cubic yards ascertained, as pointed out hereinbefore, by the liquid method. We have said that the plaintiff might recover for the total area dry-packed and grouted. The obstacle in the way is the lack of proof defining the extent of space dry-packed." (R. 679, Decision p. 17.)

The pending bill would enable the court to determine the amount of dry-packing by the so-called liquid method, "as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing." From such evidence as has heretofore been presented to the court, and from such additional evidence as may be required, it would seem that the court can reasonably determine what dry packing and grout were supplied by the contractor for which he has never been paid.

VII. Conclusion

Reference of this matter again to the Court of Claims is, therefore, only just and equitable in order to obviate a hardship which has been imposed upon the contractor. Only in this way can the Congress enable the court to rectify its own mistake and compensate the contractor for the materials and labor which he furnished to the Government, which were necessary in the construction of the tunnel, which the contracting officer directed to be supplied, of which the Government has received the benefit and use there many years, and yet for which Pope has not been paid.

INDEX

CITATIONS

675044—45 — 1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 520

ALLEN POPE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 63–110) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 1, 1945 (R. 146). The petition for a writ of certiorari was filed on October 18, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, and Section 4 of the Special Act of February 27, 1942 (56 Stat. 1122).

QUESTION PRESENTED

Whether the Special Act of February 27, 1942, required the court below to award petitioner compensation for the removal of material which caved in over the arch of the tunnel being constructed under contract with the United States, in addition to compensation awarded him for filling the caved-in spaces with "dry-packing" and "grout."

STATUTE INVOLVED

The Special Act of February 27, 1942 (56 Stat. 1122), is set forth in the Appendix, *infra*, pp. 17–18.

STATEMENT

In 1924 the petitioner entered into a contract with the United States to construct a subterranean tunnel as part of the water supply system for the District of Columbia (R. 9–46, 110, 122; *Pope* v. *United States*, 76 C. Cls. 64, 78).[1] The work was completed in 1927 (R. 47). The contract permitted the use of "dry-packing" and "grouting" in certain areas surrounding the tunnel where cavities were left by the excavation (R. 43, 124; 76 C. Cls. 64, 80). To "dry-pack" an area, rocks of medium size are packed tightly into the inter-

[1] 76 C. Cls. 64 refers to the findings of fact and opinion of the Court of Claims, concerning the claims here involved, rendered in 1932 in Court of Claims Case No. K–366, referred to in Section 3 of the Special Act, Appendix, *infra*, p. 18. The findings in that case (R. 110–122) were made a part of the findings herein by reference (R. 63).

stices in the ground; then "grout" (concrete of the consistency of soup) is pumped in, which, when it hardens, welds the rocks into a solid mass (R. 122–123; 76 C. Cls. 64, 78–79).

During the course of the work, there was constant disagreement as to the amount of dry-packing and grouting for which petitioner should be paid (R. 122–129; 76 C. Cls. 64, 78–86). The drawings accompanying the contract designated, by a so-called "B" line, the outer limits of excavation for which payment would be made (R. 30; *Pope* v. *United States,* 323 U. S. 1, 5). Where the tunnel passed through solid rock, the Government refused to pay for any dry-packing or grouting except such as had been placed within the "B" line, *i. e.,* between the outer masonry wall of the tunnel and the outside limits of compensable excavation (R. 116, 127–129; 76 C. Cls. 64, 72, 84–85). In the other sections of the tunnel, the Government paid only for such packing and grouting as its calculations, based upon measurements of the area, showed to have been placed above the crown of the tunnel arch (R. 110–116, 124–129; 76 C. Cls. 64, 65–72, 80–84). The contractor, on the other hand, claimed compensation for whatever dry-packing and grouting he had done on the project, regardless of where it was placed (R. 125–126, 129; 76 C. Cls. 64, 81–82, 86). Certain changes made by the Government's contracting

officer also resulted in disagreements. The contracting officer lowered the "B" line by three inches, thus decreasing the area to be excavated, and also directed the omission of a quantity of "lagging" (timbered supports used on the side walls of certain sections of the tunnel). Cave-ins from the sides occurred, requiring that the caved-in materials be removed and that the spaces be filled with dry-packing and grout. Petitioner attributed the cave-ins to the omission of the lagging and sought to be compensated for the extra work consequent thereon. (R. 118–119, 139–140; 76 C. Cls. 64, 74–75, 96–97.)

Because of these disputed sums and others not now material, petitioner sued in the Court of Claims (Case No. K–366) to recover $306,825 for breach of contract (R. 47). After a full trial, the court made findings of fact (R. 110–122) and rendered an opinion (R. 122–145) dealing with the issues involved (76 C. Cls. 64, 78–102). The court denied recovery for the additional work consequent upon the changes made by the contracting officer because they had not been ordered in writing as required by the contract (R. 139–142; 76 C. Cls. 64, 96–99). The court also denied recovery for the additional dry-packing and grouting (R. 122–129; 76 C. Cls. 64, 78–86). However, on the other items of claim not here material, recovery was allowed in the sum of $45,174.46 (R. 47, 64, 122, 145; 76 C. Cls. 64, 78, 102).

With respect to the claim for dry-packing and grouting, the petitioner had no measurement of the space so treated by him, but, predicating the amount of his claim on the "liquid method" measurement, based upon the number of bags of cement used, he sought to recover for dry-packing 5,561 cubic yards at the rate specified in the contract (R. 128–129; 76 C. Cls. 64, 85–86). The Court of Claims, however, while of the opinion that the Government had "received the benefit" of the dry-packing actually done and the grouting in the dry-packed areas (R. 128; 76 C. Cls. 64, 84; 323 U. S. 1, 6) and that the Government was liable for whatever dry-packing had been done and for so much of the grout as had actually found its way into the dry-packed areas (R. 129; 76 C. Cls. 64, 86), refused recovery because of the deficiency in proof as to the extent of the areas so treated (R. 129; 76 C. Cls. 64, 86). Four motions for a new trial were made and denied (76 C. Cls. 64; 81 *id.* 658; 86 *id.* 18; 100 *id.* 375, 390), and a petition for a writ of certiorari was denied (303 U. S. 654). The judgment of $45,174.46 recovered by petitioner was duly paid (R. 48).

On July 7, 1942, pursuant to the Special Act approved February 27, 1942, (Appendix, *infra*, pp. 17–18; R. 1–2, 48–49; 323 U. S. 1, 3–4), petitioner instituted the present proceeding to recover $162,616.80, the total amount alleged to be due at contract prices for all the excavating, concret-

ing, dry-packing, and grouting which had not previously been paid for (R. 1–9; *Pope* v. *United States,* 100 C. Cls. 375, 390–392). Petitioner sought recovery for (1) the excavation of 57 cubic yards of caved-in material between the original "B" line and the "B" line as lowered by the contracting officer; (2) the excavation of 287 cubic yards of materials which caved in from the side walls because of the omission of side-wall lagging; (3) concreting the caved-in side-wall cavities; and (4) dry-packing and grouting caved-in spaces over the tunnel arch (R. 4, 6–8, 64–65); all of which claims had previously been asserted by petitioner in Case No. K–366 and disallowed therein by the Court of Claims (R. 64–65, 110–114, 116, 118–119; 76 C. Cls. 64, 65–70, 72, 74–75). Petitioner also sought recovery for the "excavation" of 4,781 cubic yards of materials which caved in over the tunnel arch,[2] at $17 per yard (R. 4–6, 8, 64). This claim as to excavation had not been asserted as such in Case No. K–366 (R. 64, 110–122).

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[2] Petitioner arrived at this number of yards on the theory that "the extent of the caved-in spaces is accurately determined from the coextensive volume of spaces drypacked and grouted" (R. 6). From the 5,561 cubic yards claimed by petitioner to have been drypacked (*supra*); R. 6, 129; 76 C. Cls. 64, 86), the petitioner has deducted the 57 cubic yards included in item (1), *supra*, and 723 cubic yards as to which petitioner's claim was allowed in Case No. K–366 (R. 6, 64, 118; 76 C. Cls. 64, 74).

A hearing was held before a commissioner, but the court below made no findings of fact (100 C. Cls. 375, 393), and dismissed the petition on the ground that the Special Act was unconstitutional (R. 47–60; 100 C. Cls. 375) as a legislative "encroachment by Congress upon the judicial function of the court" (323 U. S. 1, 4). This Court granted certiorari (R. 61; 321 U. S. 761) and, on November 6, 1944, ruled that the Special Act was constitutional (323 U. S. 1), holding that it created a "new obligation of the Government * * * where no obligation existed before" (*id.* 9). On December 6, 1944, the mandate of this Court, remanding the case for further proceedings in conformity with its opinion of November 6, was filed (R. 63).

On resubmission to the court below (R. 63), that court found that (1) the excavation of the materials necessitated by the lowering of the "B" line "would have had to be paid for under the contract if the contracting officer had not changed the plans by lowering the B line"; (2) the removal of the materials caved in from the side walls "was made necessary by the contracting officer's direction to * * * omit the side wall timber lagging"; (3) the filling of these caved-in spaces with concrete "was directed by the contracting officer"; and (4) the dry-packing and grouting of the spaces left vacant by the cave-

ins from above the tunnel were "done at the direction of the contracting officer or his representative" (R. 66–67). The court below further found that "the removal of the materials which caved in from above the tunnel * * * was not made necessary by any direction or default on the part of agents of the Government"; and that none of the work mentioned had been paid for, "but, as to the work of disposing of the materials which caved in from the top of the tunnel, [petitioner] will have been paid for that work what he expected to receive under the contract and what he was entitled to receive at contract rates, when he is paid the contract rates for dry packing and grouting the spaces left by the cave-ins" (R. 67). The court below found that the "unit prices named in the contract" were, for excavating, $17, for concrete work, $17, for dry-packing, $3, all per cubic yard, and for grouting, $3 per bag of cement (R. 65, 3). At these rates it allowed all the petitioner's claims, except that seeking additional compensation for removing 4,781 cubic yards of materials which caved in over the tunnel arch, and granted judgment to petitioner in the amount of $81,339.80 (R. 67–83). Two judges dissented in part (R. 84–110).

ARGUMENT

We submit that the question presented is of no general importance and that the decision below is correct.

1. The question presented involves the construction of the Special Act of February 27, 1942, merely to ascertain whether it was the intention of the Congress to provide therein that the court below, in determining and rendering judgment "at contract rates" upon the claims of petitioner, was, in addition to compensating petitioner for dry-packing and grouting the overhead caved-in spaces at $3 per cubic yard plus $3 per bag of cement, required to compensate him at $17 per cubic yard for removing the materials which fell from the spaces dry-packed and grouted. The claim for the latter additional compensation, presently asserted by petitioner, was not asserted by him either in his previous suit (No. K–366) in the Court of Claims (R. 64, 110–122) or, as the court below found, before Congress (R. 78–80). The current question presented by petitioner is one neither of importance nor of any general significance. It is unique, involving no general principles, and its resolution will resolve no controversies presently pending or likely to arise in the future. In these circumstances, we submit that a writ of certiorari should not be granted. The controversy between petitioner and the United States has three times occupied the attention of the Court of Claims (76 C. Cls. 64; 100 *id.* 375; R. 110–145, 63–110) [3] and three times (in-

[3] In addition, petitioner made four motions for new trial. 76 C. Cls. 64; 81 *id.* 658; 86 *id.* 18; 100 *id.* 375, 390.

cluding the present petition) that of this Court (303 U. S. 654; 321 U. S. 761; 323 U. S. 1); it "has long been pending and should be brought to an end". See *Lindheimer* v. *Illinois Tel. Co.*, 292 U. S. 151, 175.

2. The decision of the court below is correct. Section 2 of the Special Act directed the court below "to determine and render judgment at contract rates" upon the petitioner's claims

> for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

This Court held the Act to be constitutional (323 U. S. 1), as it created "a new obligation of the Government to pay petitioner's claims where no obligation existed before", and held that the congressional power "to provide for the payment of debts * * * is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary". (*Id.* 9.) The Court stated that Congress had created "a legal, in recognition of a moral, obligation to pay petitioner's claims" (*id.* 10). Cf. *United States* v. *Realty Company*, 163 U. S. 427, 440. These principles require that the Special Act be interpreted as recognizing a legal obligation coextensive with the moral obligation of the Government. The court below, in allowing all the petitioner's claims, except that for the removal, as such, of the caved-in material from over the tunnel arch, clearly gave recognition to the equitable and moral considerations upon which those claims are founded (R. 66–67). No equitable ground or moral obligation exists, however, which is susceptible of conversion into a legal obligation to pay for the removal, as such, of the caved-in over-head materials.

Petitioner's contract with the United States (R. 9–46) clearly provided "that no excavation removed beyond the 'B' line [such as the materials

which caved in from above the tunnel, for whose removal petitioner presently seeks additional compensation] will be paid for" (R. 38, 72). Moreover, the petitioner in his former suit in the Court of Claims (No. K–366) not only did not assert a claim for the removal as such of these caved-in materials, but expressly disclaimed any right to separate compensation for their removal (R. 110–122, 72–75; 100 C. Cls. 375, 385–386).

The petitioner asserts, however (Pet. 4–5, 11–13), that his right to separate pay for the removal of the caved-in materials is founded not on the contract but on the Special Act. A short answer to this is that the Special Act requires the Court of Claims to render judgment "at contract rates" (sec. 2) and, as pointed out by the court below, there was no contract rate provided for removal of caved-in over-head materials other than the rates provided for dry-packing and grouting the caved-in spaces (R. 75–76, 78, 83). Moreover, the Act fails to reveal a congressional intention that petitioner should be separately compensated for the removal of the caved-in materials. In presenting his claim to Congress, petitioner asked merely that Congress "direct the court to consider the case again and grant him relief as was denied him heretofore" (R. 78). Petitioner further, in stating the effect of the pending bill, said that it "would enable the court to determine the amount of dry packing by the so-called liquid

method 'as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.' From such evidence as has heretofore been presented to the court, and from such additional evidence as may be required, it would seem that the court can reasonably determine what dry packing and grout were supplied by the contractor for which he has never been paid" (R. 79). Petitioner made no reference to his separate claim now presented for the disposition of the materials which fell from the top of the tunnel (R. 79). It is difficult to believe that petitioner, who has exhibited marked assiduousness in prosecuting his claims before both the judicial and legislative branches of the Government, would, in his statement to Congress, have left to inference a claim intended to be asserted by him which, in terms of money, amounts to approximately one-half of the total claim asserted by him in the court below. On the contrary, it is clear from the fact that petitioner asked Congress merely to direct the Court to grant him such relief as had theretofore been denied him (in Case No. K–366) that petitioner was not asserting claims before Congress different from those he had asserted (in Case No. K–366) in the Court of Claims.

That the petitioner's claims were so understood by Congress is also manifest. Both the House and Senate Reports on the Special Act refer to the fact that it "would enable the court to correct its error" (R. 80; H. Rep. No. 865, 77th Cong., 1st Sess., p. 3; S. Rep. No. 1019, 77th Cong., 2d Sess., p. 2).[4] Since the Court of Claims could not have committed error with reference to a claim never presented to it, the congressional intention did not encompass the instant claim. Certainly the language of the Special Act

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[4] The items as to which the House and Senate Committees indicated petitioner was to be given a right to recover were stated in the committee reports as follows:

> There is no questioning the fact that he was put to additional items of expense by reason of the change orders of the contracting officer; that the claimant did supply certain dry packing (stones put into place) and grout (liquid cement mortar pumped into the spaces between the dry packing); that this was done under orders and supervision of the contracting officer; and it was accepted by the Government inspectors after inspection thereof.
>
> The reported bill would enable the court to correct its error; reimburse him for the expenses to which he was put as the result of the change orders; determine the amount of dry packing "by the liquid method as described by the court and based on the volume of grout actually used"; and determine the amount of grout supplied as established "by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing." (H. Rep. No. 865, 77th Cong., 1st Sess., p. 3; S. Rep. No. 1019, 77th Cong., 2d Sess., p. 2).

The court below awarded judgment to petitioner on the items mentioned (R. 80–81).

itself gives no indication that petitioner was to be paid for the removal of the materials which caved in from over the tunnel apart from the compensation petitioner received for dry-packing and grouting the vacated areas. And any claimed ambiguity in the Act in this respect must be resolved against petitioner, not only in view of the history of the Act, but also in view of the "familiar rule" that "every public grant * * *, if ambiguous, is to be construed against the grantee and in favor of the public." See *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 49; *Shearer* v. *United States*, 87 C. Cls. 40, 80.

Section 2 of the Special Act provided that petitioner was to obtain judgment "at contract rates" "for certain work performed for which he has not been paid." The court below granted judgment to petitioner for dry-packing and grouting the areas left vacant by the over-head cave-ins (R. 70–71). As petitioner understood his contract with the United States, as he stated his claim to Congress, and as it was understood by Congress, it is plain that, in the words of the court below (R. 83), "the contract rate for removing caved-in materials was included in the unit prices which he [petitioner] bid for dry packing and grouting, so that if he gets paid for those processes he will have been paid the 'contract rate' for excavating the mate-

rials. * * * When we so interpret the special act as to make the plaintiff's former claims and testimony, his former failure in this court, his statement to Congress, the report of the Committee, which that statement induced, and the special act, one consistent whole, we have no doubt that we are giving to the plaintiff the full measure of relief which Congress intended him to have."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

PAUL A. SWEENEY,
ABRAHAM J. HARRIS,
Attorneys.

DECEMBER 1945.

APPENDIX

The Special Act of February 27, 1942 (56 Stat. 1122), provides:

> **AN ACT To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.**
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.
>
> SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contract-

ing officer, whereby the plans for the work were so changed to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

SEC. 3. Any suit brought under the provisions of the Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K–366, in the Court of Claims, together with any additional evidence which may be taken.

SEC. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 520.

ALLEN POPE, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITIONER'S BRIEF IN REPLY.

Respondent's brief in opposition to the petition for writ of certiorari calls for brief reply.

THE QUESTION.

Respondent not only does not state (Respondent's brief, p. 2) the question now involved, but, on the contrary, evades it. It ignores what is the real question: Has the lower court correctly construed the Special Act here involved or complied with the Mandate of this Court following the decision (323 U. S. 1)?

It is petitioner's view that the Court of Claims has failed properly to interpret the Special Act (petition, pp. 2, 3) and that it has not understood or applied the Mandate of this Court.

THE ACT.

Section 2 of the Special Act of February 27, 1942, provides that the Court of Claims "is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope * * * for the work of excavating materials which caved in over the tunnel arch." This item of claim the Court of Claims has disallowed because it is stated that the contract involved in the original litigation fixes no "rate" for "excavating caved-in materials", but, on the contrary, provides that no payment shall be made for excavating materials from outside a prescribed ("B") line. It overlooks that the Special Act here involved as interpreted by this Court (323 U. S. 1) remedied that precise omission and provides, as a *new cause of action*, that the petitioner is to be paid at the contract rate for excavation for excavating caved-in materials. The work was done, the respondent had and has the full benefit thereof and the work has not been paid for. Surely this forms a sufficient background for the *moral* obligation to pay, changed into a *legal* obligation by the Act.

THIS COURT'S MANDATE.

This Court decided (323 U. S. 1) that the Act creates a new cause of action independent of any right existing at law under the original contract. The Court of Claims has failed to carry into effect what this Court thus decided. It has considered petitioner's claim on the basis of his *contract* right and not on the basis of his *right under the act* for payment for this excavation, except as it endeavors to find *meaningless* the language of the Act relating to excavation of caved-in materials. The lower court has thus ignored and not applied the plain intendment of the Mandate of this Court. It would appear to be in disregard of the well settled principles in such case as set out *In Re Potts*, 166 U. S. 263 under which, if for no other reason, petitioner is entitled to have the review now sought of the action of the lower court.

THE CASE IS REVIEWABLE.

1. Any case involving the proper construction of an Act of Congress would appear to be, necessarily, of general importance to the public at large.

2. This Court alone is the judge of what its own mandates mean. What such mandates mean is of importance not only to the petitioner but to the country at large.

3. The questions are novel. The Court of Claims first held (100 C. Cls. 375) that the language of the Act was plain and unambiguous in directing it to allow what it now disallows. It now holds, in effect, that the "plain" language of the Act was not intended to be used—that the Act does not mean what it seems to say.

This case involves such questions and is one of a character, therefore, that should be reviewed by this Court.

Respectfully submitted,

GEORGE ROBERT SHIELDS,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 520.

ALLEN POPE, *Pro se*,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING

of

Petition for Writ of Certiorari to the Court of Claims Denied January 2, 1946.

Petitioner prays that rehearing be granted of his petition for issuance of writ of certiorari to review the judgment of the Court of Claims in the above entitled case; that, thereupon, the order of January 2, 1946, denying said petition be vacated; and that said petition be granted as therein and herein requested.

OPINION BELOW.

The opinion of the Court of Claims (R. 63-110) is not yet officially reported in the Court of Claims Reports. It is reported in 62 Fed. Supp. 408.

JURISDICTION.

The judgment of the Court of Claims was entered October 1, 1945 (R. 146). Certiorari was denied January 2, 1946. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, and under Section 4 of the Special Act of February 27, 1942 (R. 1), and quoted below.

STATUTES INVOLVED.

The statutes involved consist of a Special Jurisdictional Act of Congress supplying cause of action to petitioner and jurisdiction thereunder to the Court of Claims and to this Court, Private Law 306, 77th Congress, Approved February 27, 1942, 56 Stat. 1122; and the statutes relative to the General Jurisdiction of the Court of Claims as set out in "The United States Code, 1940 Edition," Title 28, Chapter 7, §§ 241-293 thereof, especially

§ 241. Judges.
§ 243. Session; quorum.
§ 250. Jurisdiction.
§ 263. Rules of practice.
§ 288. Certification to Supreme Court of questions of law; certiorari by Supreme Court to Court of Claims; no other review allowed.

The said Special Act (R. 1) reads as follows:

"AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any

statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" and "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

SEC. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

SEC. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942.

Of the "United States Code, 1940 Edition," the two following sections are quoted from pages 2513, 2514:

> § 241. (Judicial Code, section 136.) The Court of Claims shall consist of a Chief Justice and four judges, * * *
>
> § 243. (Judicial Code, section 138.) The Court of Claims shall hold one session in the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided,* That the concurrence of three judges shall be necessary to the decision of any case.

QUESTIONS PRESENTED.

(1) Whether the Court of Claims (as constituted and vested under United States Code, 1940 Edition, Title 28, Chapter 7, §§ 241 to 293, especially § 241, Judges; § 243, Session: quorum; § 250, Jurisdiction; § 263, Rules of Practice; and § 288, Certification to Supreme Court of questions of law; certiorari by Supreme Court to Court of Claims; no other review allowed; and under the current rules of said Court of Claims, especially Nos. 75 to 90 pertaining to hearing, argument and trial; and under the terms of the Special Act here involved, 56 Stat. 1122, supplying cause of action to petitioner and jurisdiction to the Court of Claims and to this Court) heard the case validly for decision where a quorum of four judges heard the oral argument and the decision (on the particular claim here involved) was given by concurrence of three judges, one of whom was not present at the trial, and where two judges, who were present thereat, dissented.

(2) The same, under the added circumstance that the sole issue disputed was a point of law, i.e., the interpretation of the Special Act as to whether it provides for payment of caved-in material as a separate item at the prior contract rate for excavation.

(3) The same, under the further circumstance that the case was one remanded by the Supreme Court, the meaning and constitutional validity of the said Special Act having been considered and decided and the decision of the lower court reversed with mandate ordering judgment accordingly.

(4) Whether under such foregoing circumstances the lower court should not have remanded the case for reargument before the full bench, or, if one of the regular judges was not available, one of the retired judges to serve instead and both parties invited to participate.

(5) Whether, under such above circumstances as obtained in the decision upon mandate below, the Court of Claims should not have certified to the Supreme Court the distinct question of law involved as to the meaning of the Special Act with respect to excavation of caved-in materials as provided by Sec. 3(a) of the Act of February 13, 1925, Rule 40 of this Court.

STATEMENT.

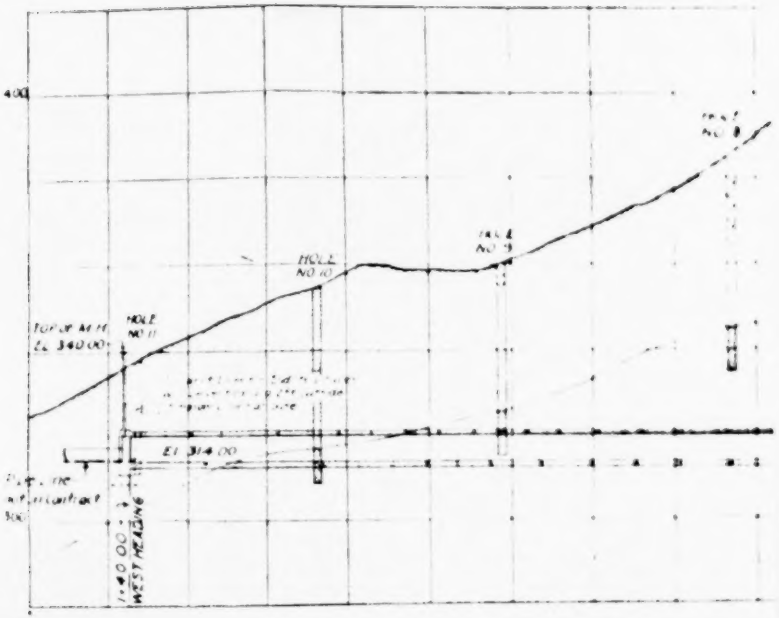
Summary of following statement: The present request is on the basis of novel, Federal issue involving both the Constitution and laws of Congress, and upon new developments since denial of the petition for certiorari, all being matter believed of wide, general application.

The lower court, in an action based on a Special Act of Congress, held the Act unconstitutional; and singled out, as illustrating its contention, the clear provisions in the Act providing for payment of excavation of caved-in materials. This Court reversed the decision below and remanded the cause for judgment accordingly. Prior to the Special Act, petitioner had constructed a tunnel for the Government on a unit price contract which limited payment for excavation to a given line, but on the other hand, made representations at to geological formations, as to use of timber, and use of excavated materials. The roof of the tunnel caved in

throughout its whole length and the caved-in materials were excavated. In a suit (K-366) founded on the contract, petitioner could not claim this excavation of caved-in materials on the basis of excavation within the agreed pay line, but he did claim for the work on the basis of damage for an alleged misrepresentation. Recovery was denied upon this item among a number of others likewise desired. As to four of these items including this item of excavation, the Court made certain favorable comment. After five motions for new trial, the court suggested a jurisdictional Act in Congress.

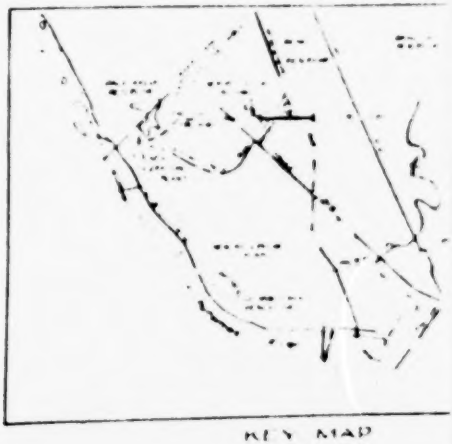
Petitioner applied for an act covering all his claims. He subsequently, in an eighth bill, requested legislation covering only the four items as to which the court had made the favorable comment. The Attorney General reviewed the history of the claims, paraphrased the Act, enumerated the four items, and suggested that policy as to its passage was for the Congress to decide. The Claims Committees, of their own volition, examined exhibits and other evidence from the Court of Claims, considered petitioner's statement and enacted the bill creating new liability of the Government and supplying jurisdiction to the Court of Claims and to this Court. This Act the lower court held unconstitutional.

In action upon remand, a quorum of four judges heard the argument. The decision below was by the concurrence of three judges, one of whom was not present at the trial; two judges who were present dissented. This decision this Court declined to review on January 2, 1946. On the same day this Court deferred several cases for reargument before a full bench. Along with petitioner's case the lower court, on October 1, 1945, decided three other cases in the same manner by having the absentee judge sit in decision, two judges dissenting. On January 7, 1946, motions for new trial were overruled. Plaintiffs in two of these cases are proceeding further on the basis of the absentee judge principle. This is the novel, Federal issue and the recent de-

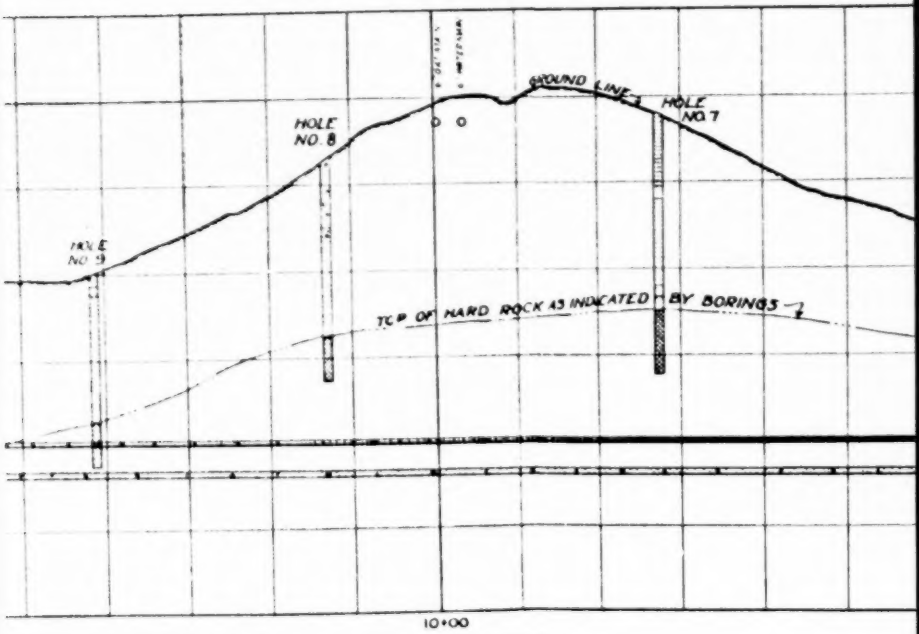


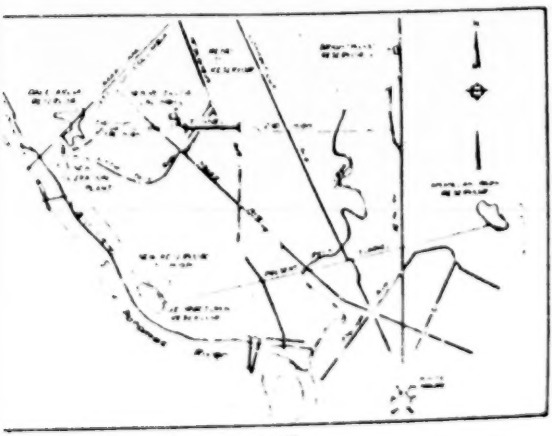
REVISION NO 1

west heading of Tunnel shifted 13.0' East. Stations and distances changed accordingly

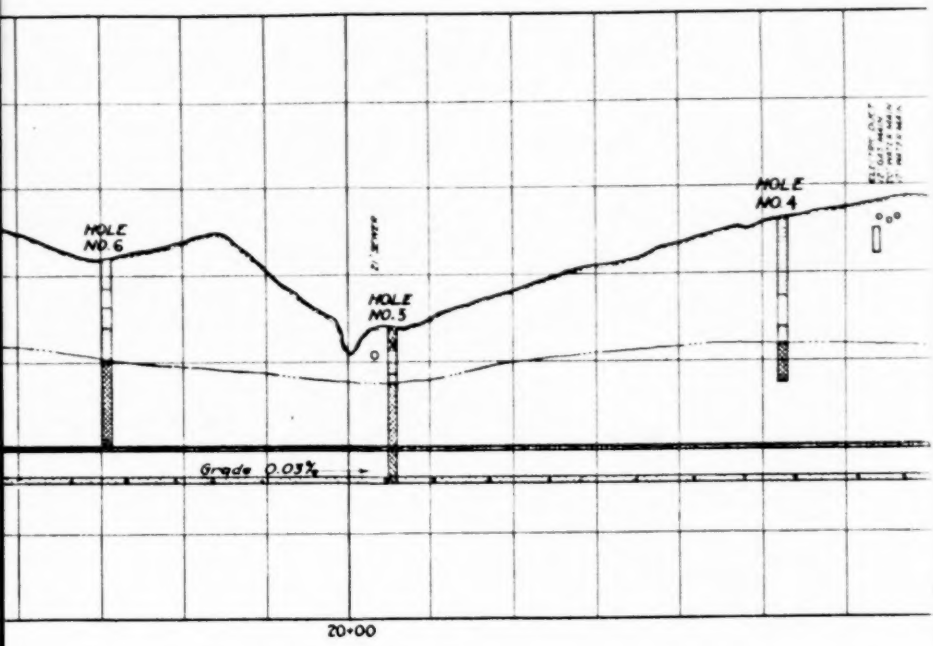


KEY MAP


GROUND LINE
HOLE NO. 8
HOLE NO. 7
HOLE NO. 9
TOP OF HARD ROCK AS INDICATED BY BORINGS
10+00



KEY MAP



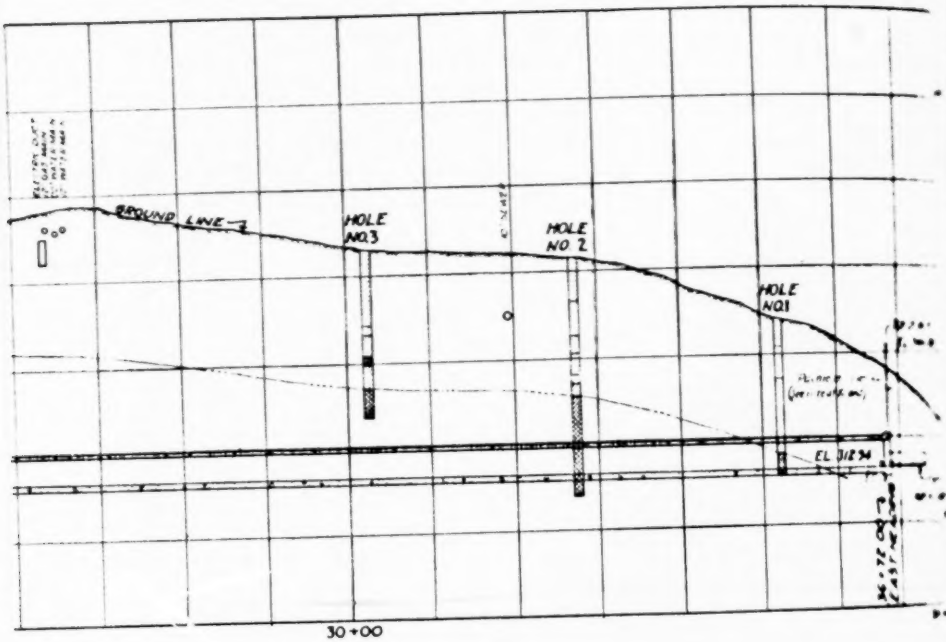
PROFILE OF TUNNEL

—SCALES—

HORIZONTAL : 1IN = 100FT — VERTICAL : 1IN = 20FT.

NOTE:

THIS DRAWING FORM
PART OF THE SPECIFICATION
FOR THE SECOND HIGH TUN



BORING LEGEND

Sand

Clay

Sand & Clay

Gravel

Rotten Rock

Soft Rock

Hard Rock

Location of Borings shown thus ⊙ in plan

REVISIONS	
No.	Date
1	2-17-25

NG FORMS
CIFICATIONS
HIGH TUNNEL

INCREASE OF WATER SUPP.
FOR
DISTRICT OF COLUMBIA

SECOND HIGH TUNNEL
GENERAL PLAN AND PROF.

IN 2 SHEETS - SHEET NO 1

Scales as Shown

U.S. Engineer Office, Washington, D.C.

Submitted:

E. D. Hardy
Assistant Engineer

Approved:

Drawn: B.S.E.
Checked: P.D.M.
Traced: B.S.E.

APPROVED BY CHIEF OF ENGINEERS
SEPT 22, 1924 E.D. 3760-5

velopment. It is not found that this practice was ever before indulged below. It is of particular importance in petitioner's case because, in effect it is believed, one lower court judge, who was absent from the trial, has virtually overturned the unanimous decision of this Court.

The above statements amplified, placed in proper sequence and as fully documented to the record are now given:

Contract: Petitioner constructed a tunnel under contract with the United States (R. 9-46). It was a unit price contract, covering ten items of work with definite limitations as to each item. Item No. 1 was for excavation (R. 38). Payments thereunder were restricted to such materials as were removed from within a given line called the "B" line (R. 38) and so designated on the contract drawing No. 2 (R. 146; reproduced R. 112 A; see also R. 112 B and R. 112 C). The contract made representations as to the character of geological formations revealed by government test borings (R. 25, par. 22). Contract drawing No. 1 (R. 146), reproduced opposite in pertinent part, depicted the tunnel as lying entirely in a region of rock, more than 90% of it designated as "hard rock." The contract further made representations as to the use of timber and as to the use of excavated material for crushed stone in making concrete and for stone in dry packing (R. 38, 39). The contract rate for excavation was $17.00 per cubic yard; for concrete $17.00 per cubic yard; for dry packing $3.00 per cubic yard of space filled; for cement grout (liquid mortar consisting of cement, sand and water in specified proportions) $3.00 per bag of cement so mixed and pumped into the dry packing (R. 9, 10, 65 par. 6). So mixed, one bag of cement resulted in 2.62 cubic feet of grout (R. 128). The spaces or voids between the stones of the dry packing, were 40% of the space packed or 10.8 cubic feet per cubic yard of space packed and required the use of 4.1 bags of cement to make the grout necessary to fill said voids (R. 128). At the contract rates:

The cost of one cubic yard of concrete masonry was		$17.00
The cost of one cubic yard of dry packed and grouted masonry was, for dry packing,	$3.00	
For grout 4.1 bags at $3.00	12.30	
Total for dry packed—grouted masonry	$15.30	$15.30

Performance of contract work: Petitioner constructed the tunnel in accordance with the contract, as directed by and under the supervision of the contracting officer (R. 110-122; 63-67). The roof of the tunnel proved not to be "hard rock" as expected but loose, unstable material which caved in throughout the full length of the tunnel (R. 112 B, 112 C, 121) and, in places, caved to the ground surface above (R. 121). The officer required all of this caved-in material to be excavated from the tunnel. Such caved-in material from outside the "B," or pay, line could not be paid for as excavation under Item No. 1. The officer declined to pay for it otherwise. Petitioner thereupon claimed misrepresentation of the formation disclosed by the test borings and asked to be paid for the additional costs involved (R. 120, 121). Defendant paid for the timber which it required to be used (R. 116, 117, Fdg. V) but refused payment for excavating the caved-in material claimed as a quantum meruit for alleged misrepresentation (R. 120, 121). This work of excavating the caved-in materials was done; the Government had the benefit but has not paid for it (R. 67).

Suit under the contract: Petitioner sued under the contract as cause of action, No. K-366 in the Court of Claims (R. 110-145), 76 Ct. Cls. 64. The court's finding XIV as to the damage resultant from the alleged misrepresentation is set out R. 120-122 and further illustrated by its Plates II and III (R. 112 B and R. 112 C), and discussed in the opinion (R. 145), Finding XIV concludes:

> The contractor did encounter much material which was soft, seamy rock and running earth, materials contrary in foundation from what he expected to encounter, but drawing No. 1 or the information supplied him by the

> contracting officer did not misrepresent what the borings actually disclosed. The cost of excavation was materially increased to the contractor in an amount not established by the evidence.

Thereafter petitioner filed five motions for new trial and applied for certiorari, 81 Ct. Cls. 658; 86 Ct. Cls. 18; 303 U. S. 654. In all of these efforts petitioner contested for this item of damage consequent to the alleged misrepresentation, which was solely the cost of removing the caved-in material.

The court disallowed completely many of the items claimed, but as to four of them it made certain favorable comments, including that just quoted as to excavation. As to the drypacking and grouting it said (R. 129):

> We have said that the plaintiff might recover for the total area dry packed and grouted. The obstacle in the way is the lack of proof defining the extent of space drypacked.

As to the excavation and concrete work required to be done by the officer's changes in plan, Finding XI (R. 118) ascertained the costs exactly, and, in opinion, the court said (R. 140):

> The contracting officer possessed no authority to do what he did, and the contractor would have been within his contractural rights in refusing to proceed until the contract provisions were complied with.

Legislation: The judgment in K-366 having become final, petitioner applied to Congress for relief. The record here sent up (R. 1-146) reveals little of what was done in Congress except the final result, the Special Act of February 27, 1942 (R. 1). Public documents, of which, it is believed, the court may take judicial notice are printed in the Appendix to Petition for Certiorari No. 520, October Term, 1945, pp. 15-40 thereof. These documents consist of eight bills and Report No. 1019 of Claims Committee of the Senate. The first bills in the sequence purport to supply juris-

diction to cover all the claims denied in K-366. The fourth bill, p. 17 of that Appendix, discards the contract as cause of action and purports to create new liability for but three items of work, not including the excavation of caved-in materials. The fifth bill incorporates payment at

> "contract rates" * * * "for the work of excavating materials which caved in over the tunnel arch * * *"

Said App. pp. 18-20. The bill establishes three criteria for award thereunder, namely;

(1) that the work shall have been performed; (2) that payment shall not have been made; (3) that the Government shall have received the use and benefit.

This bill is substantially the form of the bill ultimately passed. It permits adjudication of but four items of claim, namely those as to which the court had made favorable comment as just noted hereinabove.

Suit under the Special Act: Suit under the Special Act as cause of action was filed, No. 45,704 in the Court of Claims (R. 1), 100 Ct. Cls. 375. Testimony was taken, and Commissioner's Report filed (R. 63). The case was argued and submitted on the merits (R. 47).

The court, without making any findings, held the Special Act unconstitutional, as an infringement upon the judicial powers of the court and dismissed the petition (R. 60), Littleton, *Judge*, dissenting (R. 59).

Jones, *Judge*, took no part in the decision of this case (R. 60).

There were four items of claim (R. 3-8). The court discussed "just one of the items", the primary item of excavation of caved-in materials (R. 55-57).

Certiorari by Supreme Court: The Supreme Court granted petition for writ of certiorari to the Court of Claims. The case was argued October 16, 1944, and decided November 6, 1944, 323 U. S. 1. The matter of excavation of caved-in materials was covered by the briefs. During oral argu-

ment, Mr. Assistant Attorney General Shea, for respondent, held that Congress did not intend to include as a separate item this item of excavation of caved-in materials. Mr. Justice Frankfurter asked Mr. Shea the source of his information. Mr. Shea replied, "The Claims Committee Report." Mr. Justice Frankfurter said, if petitioner recalls correctly, "I have read every word of it!" The committee report was not part of the record sent up. He had it before him and proceeded to read from the report the statement of Mr. Attorney General Robert H. Jackson, paraphrasing the Act and stating what the Act directed as follows:

> Section 2 of the bill would direct the Court of Claims to determine and render judgment on certain claims of Pope for "work performed for which he has not been paid, but of which the Government has received the use and benefit." This work is described as certain excavation and concrete work performed pursuant to change orders and the excavation of caved-in places and the filling of such caved-in places with dry-packing and grout.

Mr. Shea was silent.

This court held that the Act's purpose and effect were "to create a new obligation of the Government to pay petitioner's claims where no obligation existed before," 323 U. S. 1, 9. Also "Congress has in effect consented to judgment in an amount to be ascertained by reference to the specified data," *Id.*, 11. The court remanded the case December 5, 1944, with instructions to the Court of Claims to render judgment in accordance with its decision of November 6, 1944.

Suit on remand: On March 8, 1945, the case was again argued and submitted on merits (R. 63).

This suit was not submitted on the briefs.

Judge Marvin Jones was not present at the argument.

This fact is not given in the record though Judge Jones is registered as concurring with Judge Madden and Chief

Justice Whaley to form the majority opinion (R. 83), Judges Littleton and Whitaker dissenting in part i.e., as to the item of excavating caved-in materials (R. 84, 110). Upon application, the Chief Clerk of the Court of Claims, with consent of the Chief Justice, has supplied a certified copy of the Journal of the Court of Claims for March 8, 1945, which is submitted herewith and printed in the appendix hereto. Said journal shows that Judge Jones was not present at the argument and submission of the case.

The lower court unanimously allowed three of the four items claimed. The majority, consisting of Judge Madden, Judge Jones and Chief Justice Whaley, disallowed the item for excavating the caved-in materials, which work it had found was done, that the government had received the use and benefit thereof and had not paid therefor (R. 67, 71-83). It had found further (R. 65) that the contract rate for excavation was $17 per cubic yard, but held (R. 67) that;

> the plaintiff will have been paid for that work what he expected to receive under the contract and what he was entitled to receive at contract rates, when he is paid the contract rates for dry packing and grouting the spaces left by the cave-ins.

Judge Littleton dissented as to the disallowance of this item (R. 84-110). Judge Whitaker concurred in the dissent (R. 110).

Petition for writ of certiorari to the Court of Claims to review the judgment of October 1, 1945, was duly filed, No. 520, October Term, 1945. Respondent contended, "The current question presented by petitioner is one neither of importance nor of any general significance. It is unique, involving no general principles, and its resolution will resolve no controversies presently pending or likely to arise in the future. In these circumstances, we submit that a writ of certiorari should not be granted." The petition was denied January 2, 1946.

Cases pending: On October 1, 1945, the Court of Claims announced decisions in sixteen cases. The Journal of the

Court of Claims records the absence of Judge Jones during the oral argument (called the "trial" in the court's rules) of each of these cases. In twelve of the cases, the printed decisions state that Judge Jones took no part in the decision thereof. These were cases Nos. 43,565; 44,614; 44,659; 45,623; 45,760; 45,778; 45,821; 45,993; 46,235; 46,365; 46,369 and 46,378.

In four of the cases decided October 1, 1945, there were two judges in each instance who had heard the oral argument but who ultimately dissented. In each of these cases Judge Jones is recorded as joining with Chief Justice Whaley in concurring with the writer of the opinion "the concurrence of three judges shall be necessary to a decision of any case," (U. S. Code, Title 28 § 243.) These cases were as follows:

> No. 45,455. *Geo. F. Driscoll Company* v. *The United States*, argued and submitted October 4, 1944; decided and petition dismissed October 1, 1945; motion for new trial overruled January 7, 1946;
>
> No. 45,596. *Minette G. Stein* v. *The United States.* Argued and submitted November 8, 1944; decided and petition dismissed October 1, 1945;
>
> No. 45,704. Petitioner's case, *Allen Pope* v. *The United States.* Argued and submitted March 8, 1945; decided, with 3 items of claim allowed, 1 item disallowed, October 1, 1945; petition for writ of certiorari denied January 2, 1946;
>
> No. 45,889. *Pennsylvania Company et al* v. *The United States.* Argued and submitted March 7, 1945; decided and petition dismissed October 1, 1945; motion for new trial overruled January 7, 1946.

None of these cases was submitted on the briefs.

The foregoing information was obtained by petitioner from the Docket and the Journal of the Court of Claims by permission of the Clerk who had consulted the Chief Justice. Upon request for certified copy of the Journal revealing the absence of Judge Jones from the trial in the several

instances, the Clerk stated that he had exceeded his authority except as to the record in petitioner's own case in permitting examination of the Journal and was not permitted to supply certified copies relating to other cases. Petitioner further requested, through the Secretary, interview with the Chief Justice at his convenience. He asked that the Chief Justice be informed of his intention to file petition for rehearing of his petition for certiorari, and of his desire to be furnished citations or precedents to sustain the action of the court in having Judge Jones sit in decision of the case, Judge Jones having been absent during the trial and having cast the vote necessary to the decision. Petitioner also asked for a list of cases argued before June during Judge Jones' absence and remaining undecided after January 7, 1946. The Secretary said that he had given petitioner's message to the Chief Justice, who said that because of press of business he was not granting any interviews. No answer was given to the inquiries.

It is believed matter of general knowledge that Judge Marvin Jones was absent from the court for a considerable period on war assignment and was War Food Administrator from June 29, 1943 until June 30, 1945.

Similarly, it is believed known, that Judge Madden is now abroad for an indefinite period on assignment pertaining to war settlements.

Counsel in two of the above cases, Mr. Arthur J. Phelan in No. 45,455, and Mr. Frank J. Albus in No. 45,889, inform petitioner that they are taking further immediate action in their respective cases involving the participation of Judge Jones in the decisions thereof.

TRANSCRIPT OF RECORD.

The certified transcript of the record of the proceedings below, as filed herein and printed, consists of pages 1 to 146 inclusive, and of 2 contract drawings not printed but filed separately (R. 146).

CERTIFICATE OF GOOD FAITH.

This petition for rehearing is presented in good faith and not for delay.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Claims, under the mandate of December 5, 1944, and in addition to the errors specified to be urged in the petition for certiorari, erred:

(1) Where a quorum of four judges was present at the trial of the case and a fifth judge (Judge Marvin Jones), who was not present, sat in decision providing concurrence of three judges necessary to the decision of the major item in suit and two judges who were present dissented.

(2) Where, under the same circumstances, the disputed issue was a point of law, i.e., the interpretation of a Special Act of Congress, as to whether said Act provides for payment of excavation of caved-in materials as a separate item at the prior contract rate for excavation.

(3) In failing to remand the case for reargument before a full bench.

(4) In failing to certify the distinct question of law necessary to the decision of the case to the Supreme Court under Sec. 3(a) of the Act of February 13, 1925.

REASONS FOR GRANTING REHEARING.

(1) The decision of the Court of Claims, in the major item in suit, arrived at only with the concurrence of a judge, who was absent from the trial, is contrary to the United States Code establishing and vesting said Court of Claims.

(2) The said decision thus made is contrary to the Special Act, 56 Stat. 1122, providing jurisdiction and requiring determination and judgment.

(3) The said decision as made is contrary to the "due process" provisions of the 5th and 14th Amendments to the Constitution.

(4) The said decision as made is novel procedure in the Court of Claims; never, as far as petitioner is able to discover, having been practiced theretofore.

(5) The said sort of decision is novel in any Federal court, so far as petitioner is able to discover, or in State courts especially where prescriptions of law control.

(6) The Supreme Court, not under law of Congress nor under the customary rule in cases of tie votes on appeal cases, frequently, in the interest of justice, sets cases for reargument before a full bench.

(7) As the decision stands, the effect is that by device of reconstruing an Act of Congress, the lower court by means of the vote of one judge who did not participate in the trial overturns the decision of the Supreme Court.

(8) The same sort of decision was made below in three other cases on the same date, in which further action is now pending and turning on the validity of the concurrence of the absentee judge.

(9) If one absentee judge may sit in effective judgment why not two absentee judges, three judges constituting a quorum?

(10) The procedure in said decision is contrary to procedure in prior cases in said court where, though there was the required quorum of judges who heard the argument, one judge dissented and an absentee judge voted with the majority and was assigned to write the opinion, a reargument was ordered and had. *Standard Oil Company of Indiana* v. *The United States*, 78 Ct. Cls. 714.

The assigned errors and reasons for granting the rehearing will be discussed in a short brief principally for the purpose of citing authorities.

ALLEN POPE, *Pro se*,
Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 520.

ALLEN POPE, *Pro se*,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF FOR PETITIONER.

On Petition for Rehearing of Petition for Writ of Certiorari to the Court of Claims.

Now comes petitioner for himself and respectfully represents:

The lower court, under the mandate of December 5, 1944, erred:

(1) Where a quorum of four judges was present at the trial of the case and a fifth judge (Judge Marvin Jones), who was not present, sat in decision providing concurrence of three judges necessary to the decision of the major issue in suit and two judges who were present dissented.

Prior to June 23, 1874, the Court of Claims consisted of five judges, two judges constituted a quorum and there was no provision for concurrence. On that date, there was enacted and approved 18 Stat., Chap. 468, providing:

> That any three judges of the Court of Claims shall constitute a quorum; *Provided*, that the concurrence of

three judges shall be necessary to the decision of any case.

This provision remains in the United States Code as it presently exists § 243, ante p. 4:

> "When two or more are to hear and determine, they must sit together, not separately." Stroud's Judicial Dictionary, p. 857. "A General Treatise on Statutes," Dwarris, Second Edition, 1848 (In Library of Congress) p. 670, Latin American editions, p. 276.

(2) Where under the same circumstances, the disputed issue was a point of law, i.e., the interpretation of a Special Act of Congress as to whether said Act provides for payment of excavation of caved-in materials as a separate item of claim at the prior contract rate for excavation.

This case was before the lower court or remand. The particular point of law was considered by this Court, the lower court reversed, with order to render judgment accordingly, this Court having ruled that the Special Act had created a new liability of the government, ante p. 11. While ordinarily nothing was before the lower court except what was remanded. (*In re Potts, Petitioner*, 166 U. S. 263, 265, 267; *The Eastern Cherokees* v. *The United States*, 45 Ct. Cls. 104, 131; *Himely* v. *Rose*, 5 Cranch 313, 314, 316; *Martin* v. *Hunter's Lessee*, 1 Wheaton 304, 323, 355; *Sibbald* v. *The United States*, 12 Peters 488, 491), all the more was that the situation where the absentee judge casting the effective vote took no part at all in the previous actions and none on the remand except to adjudge from the written record and statements of judges, but without having heard the parties.

(3) In failing to remand the case for reargument before a full bench.

> *Standard Oil Company of Indiana* v. *The United States*, 78 Ct. Cls. 714.

Recent cases in this Court listed in appendix hereto p. 24-25 thereof.

(4) In failing to certify the distinct question of law necessary to the decision of the case to the Supreme Court under Sec. 3(a) of the Act of February 13, 1925.

Said Sec. 3(a) is the basis of this Court's Rule 40.

The lower court had this case on remand for nearly a year before decision, during which period one of the judges was absent. Evidently the court had sound reasons for not recalling one of the retired judges to admit of reargument before a full bench. In the circumstances, the quorum of four having been equally divided, it is suggested that the duty of the lower court was to have certified the question of law to this court.

REASONS FOR GRANTING REHEARING.

From what has been said generally, having in mind the whole background of the case as epitomized under the subtitle "Summary of Statement", *ante*, p. 5, and by the actual language of the reasons assigned, it would appear that enough has been said for present purpose. Accordingly further statement will be limited to references and citations of authorities under each assigned reason.

(1) The decision of the Court of Claims, in the major item in suit, arrived at only with the concurrence of a judge, who was absent from the trial, is contrary to the United States Code establishing and vesting said Court of Claims.

The court is a legislative court and is bound by the prescriptions of Congress. The United States Code constituting and vesting the Court of Claims Title 28, Chap. 7, §§ 241-293, including provision for rules of practice, § 263, *post*, p. 2, makes mandatory that parties shall have opportunity for full hearing before final judgment.

(2) The said decision thus made is contrary to the Special Act, 56 Stat. 1122, providing jurisdiction and requiring determination and judgment.

The Act confers jurisdiction to hear, determine, and render judgment as described and in the manner set out

in section 2 thereof, and section 2 provides that the Court of Claims is hereby directed to determine and render judgment, etc., etc. (R. 1, or *ante*, p. 2.) It is believed that these provisions require the procedural minima to insure an informed judgment by one who has the responsibility of making final decision and order. *Southern Garment Workers Ass'n* v. *Fleming*, 122 F. 2d 622, 626; 74 App. D. C. 228.

(3) The said decision as made is contrary to the "due process" provisions of the 5th and 14th Amendments to the Constitution.

Petitioner had a Special Act of Congress, considered over a period of years before enactment, with consultation and barter with executive departments, finally limited to four designated items of claim; the same was formally passed and thereupon approved by the President; and, upon proper suit thereon, the said Act was considered, its constitutional validity established by this Court and the Court of Claims ordered to render judgment accordingly.

The fundamental requisite of due process of law is the opportunity to be heard before a final judgment is given. "Constitution of the United States, Revised and Annotated 1938", pp. 654, 890, 899, 905, 906, 907, and cases there cited.

The usual course of law, customary settled usage, should sanction decision, *id.* 884, 906.

"To hear". *Southern Garment Workers Ass'n* v. *Fleming*, 122 F. 2d 622, 626; 74 App. D. C. 228.

(4) The said decision as made is novel procedure in the Court of Claims; never, as far as petitioner is able to discover, having been practiced theretofore.

Petitioner finds few even border-line cases, but none except those of October 1, 1945, now pending, where opportunity was not given to be heard before final judgment as corrected by reargument, e.g., *Standard Oil of Indiana* v. *United States*, 78 Ct. Cls. 714.

No case from the Court of Claims directly on this point has been ruled on by this Court.

(5) The said sort of procedure is novel in any Federal Court, so far as petitioner is able to discover, or in State courts, especially where prescriptions of law control.

Here again there are border-line cases especially in New York State. If the regulations provided by the legislatures are examined, it appears that none is exactly in point. In the case of *Charles Shaw* v. *People*, 3 Hun. 272, one judge in a murder case was absent on Monday, it was held that he was not qualified to participate further.

(6) The Supreme Court, not under law of Congress and when not under the customary rule in cases of tie votes on appeal cases, frequently in the interest of justice sets cases for reargument before a full bench.

For current cases see this Court's list, January 2, 1945, set for reargument before a full bench. Appendix p. 24.

(7) As the decision stands, the affect is that by device of reconstruing an Act of Congress, the lower court by means of the vote of one judge who did not participate in the trial, overturns the decision of the Supreme Court.

(8) The same sort of decision was made below on the same date in three other cases in which further action is now pending turning on the validity of the concurrence of the absentee judge.

See statement ante p. 12-14.

(9) If one absentee judge may sit in effective judgment, why not two absentee judges, three judges constituting a quorum to try the case?

(10) The procedure in said decision is contrary to procedure in prior cases in said court, where, though there was the required quorum of judges who heard the argument, one judge dissented and an absentee judge voted with the majority and was assigned to write the opinion, a reargument was ordered and had.

Standard Oil Co. (Indiana) v. The United States, 78 Ct. Cls. 714.

CONCLUSION.

The judgment below (in effect given by one judge who was not present at the trial) is contrary to fundamental concepts of justice; contrary to the Constitution assuring rights of due process to citizens; contrary to the United States Code providing general jurisdiction to the Court of Claims and for Rules of practice therein; contrary to the Special Jurisdictional Act involved. The issue raised is novel. Pending cases turn upon the principle involved. This point of law, especially from the Court of Claims, has never been ruled on by this Court. The judgment below is final. This Court has jurisdiction if it will accept it. It is respectfully urged that the duty of the Court is to accept it and grant the rehearing requested.

ALLEN POPE, *Pro se*,
Petitioner.

APPENDIX.

JOURNAL OF THE COURT OF CLAIMS OF THE UNITED STATES.

Thursday, March Eighth, 1945.

The Court Met According to Adjournment

Present:

RICHARD S. WHALEY
Chief Justice

BENJAMIN H. LITTLETON
SAMUEL E. WHITAKER
J. WARREN MADDEN
Judges

45955 JAMES C. WHITE
Argued and submitted on merits by Mr. Fred W. Shields for plaintiff, and by Mr. Clay R. Apple for defendant.

44741 J. C. RIDNOUR COMPANY, A Corporation.
Argued and submitted on merits by Mr. David A. Fegan for plaintiff, and by Mr. James J. Sweeney for defendant.

45704 ALLEN POPE.
Argued and submitted on merits by Mr. George R. Shields for plaintiff, and by Assistant Attorney General Francis M. Shea for defendant.

Plaintiff's reply brief filed in open court.

Ordered that the court be adjourned until Monday, April 2, 1945, at 10 o'clock, a.m.

Attest:

(S) WALTER H. MOLING,
Acting Chief Clerk.

I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing is a true copy of the "Journal of the Court of Claims of the United States for March 8, 1945."

IN TESTIMONY WHEREOF I have hereunto subscribed my hand and affixed the seal of said court at Washington, D. C., this 15th day of January, A. D., 1946.

WILLIAM L. HART,
(Seal) *Chief Clerk, Court of Claims of the United States.*

Wednesday, January 2, 1946 102

(JOURNAL)

SUPREME COURT OF THE UNITED STATES

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103 Wednesday, January 2, 1946

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The Chief Justice announced the following orders of the Court:

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Wednesday, January 2, 1946 104

No. 23. Heber Kimball Cleveland, petitioner, v. United States;

No. 24. Heber Kimball Cleveland, petitioner, v. United States;

No. 25. Heber Kimball Cleveland, petitioner, v. United States;

No. 26. David Brigham Darger, petitioner, v. United States;

No. 27. Vergel Y. Jessop, petitioner, v. United States;

No. 28. Theral Ray Dockstader, petitioner, v. United States;

No. 29. L. R. Stubbs, petitioner, v. United States;

No. 30. Follis Gardner Petty, petitioner, v. United States;

No. 34. United Federal Workers of America (CIO) et al., appellants, v. Harry B. Mitchell, Lucille Foster McMillin, et al.; and

No. 139. Max Levinson, petitioner, v. Spector Motor Service, a Corporation. These cases are restored to the docket for reargument before a full bench.

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The following orders were not announced orally by the Chief Justice but appear on the list certified by him and filed with the Clerk;

• • • • • • • • • • •

105 Wednesday, January 2, 1946

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No. 520. Allen Pope, petitioner, v. United States, Petition for writ of certiorari to the Court of Claims denied.

(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 520

ALLEN POPE, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

MOTION FOR LEAVE TO FILE AND SECOND PETITION FOR REHEARING

on

Petition for Writ of Certiorari to the Court of Claims Denied January 2, 1946.

ALLEN POPE,
Pro se.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CASES CITED.

STATUTES.

CONGRESSIONAL REPORTS.

MISCELLANEOUS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 520

ALLEN POPE, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

MOTION FOR LEAVE TO FILE AND SECOND PETITION FOR REHEARING

on

Petition for Writ of Certiorari to the Court of Claims Denied January 2, 1946.

MOTION FOR LEAVE TO FILE.

Now comes petitioner, Allen Pope, *pro se,* and respectfully moves this Honorable Court for leave to file a second petition for rehearing on his petition for issuance of writ of certiorari to the Court of Claims to review that court's judgment of October 1, 1945, 62 Fed. Sup. 408, the said petition having been denied here January 2, 1946, and petition for rehearing having been denied February 4, 1946. The reasons for this motion appear in the petition below. This motion is presented in good faith and not for delay.

Respectfully submitted,

ALLEN POPE.

SECOND PETITION FOR REHEARING ON

Petition for Writ of Certiorari to the Court of Claims Denied January 2, 1946.

Now comes petitioner, Allen Pope, *pro se*, and, leave being granted by the Court as above requested, for the second time prays that rehearing be granted on his petition for issuance of writ of certiorari to the Court of Claims to review that court's judgment in the above entitled case rendered, October 1, 1945, in response to the mandate of this Court of December 5, 1944 (323 U. S. 1); that, thereupon, this Court's orders of January 2, 1946, and February 4, 1946, be vacated; the same respectively denying the petition for certiorari and the first petition for rehearing thereon; and that the petition for certiorari be granted and restored to the docket.

OPINION BELOW.

The opinion of the Court of Claims is set out in full in the Transcript of the Record (R. 63-110). It is not yet officially reported in the Court of Claims Reports. It is reported in 62 Fed. Sup. 408.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, including the Act of May 22, 1939; and, further, under Section 4 of the Special Act of February 27, 1942 (R. 1). This Court has jurisdiction of its own judgments until end of term.

STATUTES INVOLVED.

The statutes involved are the Special Jurisdictional Act of February 27, 1942, 56 Stat. 1122, set out in full (R. 1-2); also the statutes relative to the general jurisdiction of the Court of Claims as set out in "The United States Code, 1940 Edition", Title 28, Chapter 7, §§ 241-291 thereof.

STATEMENT.

This is a second petition for a rehearing on a petition for a writ of certiorari to the Court of Claims to review their judgment of October 1, 1945, which was rendered in response to the mandate of this Court dated December 5, 1944. 323 U. S. 1.

This petition for rehearing is to be based upon three main points believed to have been overlooked or misapprehended because of generality of treatment and on account of confusion arising from intermingling of cases below. Nothing of course is reviewable here now except what has transpired since mandate. However, the bulk of the record sent up, 146 pages, deals almost exclusively with the prior and finally decided case based on the contract, which has nothing to do with the present case based on the Special Act. Whence, in order that the Court may clearly comprehend what the lower court has done since mandate and in order to orient the three main points for rehearing now to be made, a somewhat complete statement of all the proceedings in sequence is placed in the Appendix hereto. The statements in black face type at the head of each paragraph epitomize what is said therein. A glance at these statements will serve as background to what here follows.

The petition for certiorari presented but one question, and that a simple question, for the consideration of this Court, i. e., "whether the Court of Claims properly interpreted and applied the Special Act of February 27, 1942 (56 Stat. 1122) in accordance with the decision and mandate of this Court?"

Specifically, whether under the express obligation imposed by said law of Congress, the essential criteria therein established being met, the Court of Claims must render judgment for the work of excavating caved-in materials at the prior contract rate for excavation in accordance with the mandate?

> Sec. 2. The Court of Claims **is hereby directed to determine and render judgment** at the contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, * * * for the work of excavating materials which caved in over the tunnel arch.

In other words, the question is does that Section 2 of the Act mean what it says, the jurisdiction conferred on the court by Section 1 being restricted

> to hear, determine, and render judgment upon the claims * * * as described and **in manner set out in section 2 hereof?**

Petitioner believes that this Court has already decided this question in unmistakable language in its decision of November 6, 1944, and that in this respect the lower court has failed to carry out the mandate of December 5, 1944, thereon. If the situation be thus and the lower court has determined all the criteria, and there is nothing to do but actually render judgment, judgment should issue.

This Court held that in the Special Act Congress imposed on the Government a legally binding obligation to pay petitioner's claims where no obligation existed before. 323 U. S. 1, 9-10. The Court explained that Congress had exercised its constitutional authority by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims. The mandate of December 5, 1944, required the lower court to render judgment accordingly. In net effect, the lower court has denied that obligation. It reverted to the prior contract "where no obligation existed before" and on such basis held that there is no obligation to pay for this work now. For reasons not indicated, except that those advanced by respondent may have prevailed, this Court declined to review the judgment below

on certiorari January 2, 1946. Similarly petition for rehearing was denied on February 4, 1946.

Last Chance: If that right expressly given petitioner by the Special Act cannot find vindication in this Court now, it has no chance here later nor elsewhere. This is the court of last resort. This Court has threefold jurisdiction: (1) It has jurisdiction under the Constitution, Articles III and VI thereof. The Special Act upon which the case rests is a law of Congress which already (323 U. S. 1) has been declared here as made in pursuance of the Constitution. (2) The Congress in the Special Act, Sec. 4, regulates the constitutional jurisdiction by providing that this Court may review on certiorari any decision based on said Act. (3) This Court may construe its own mandate. This is petitioner's last chance in this Court.

Petitioner's counsel, for financial reasons, withdrew his appearance in this case two weeks after certiorari was denied. Petitioner, an engineer, not a lawyer, had but a week within which to prepare, print, serve, and submit his first petition for rehearing. Counsel had considered that, the question being the interpretation of the Special Act and failure to comply with mandate, the petition for certiorari would certainly be granted. Petitioner, not being a member of the bar whose statements might be taken at word, feels impelled to demonstrate the basis for statements herein made but tries to avoid argument. The citations to cases are primarily for illustration of principle.

GROUNDS FOR REHEARING.

POINT NO. 1.

The first point believed overlooked as probably warranting grant of rehearing is:

The lower court found, unanimously, all the ultimate facts essential to judgment for recovery for the work of excavating the materials which caved in over the tunnel arch as prescribed by the Special Act, yet denied recovery.

Finding 8 (R. 67) states that this work was useful and beneficial to the Government and has not been paid for. The contract rate for excavation is set out in Finding 6 (R. 65) as $17.00 per cubic yard. Finding 5 (R. 65), second paragraph, shows, in the manner prescribed by the Act, the total volume of caved-in space as 5,561 cubic yards. Findings 1 and 3 (R. 64) show that 723 cubic yards of such excavation were previously paid for. Findings 2 and 3 show 57 cubic yards allowed for in the present judgment, which, with the 723 cubic yards, leaves 4,781 cubic yards unpaid for, which, at $17.00 per cubic yard, amounts to $81,277.00. These are all the criteria established by the Special Act.

These findings are based on the evidence and the report of a commissioner and upon hearing before the court to whom the case was submitted on oral argument (R. 63). These findings respecting the excavation of caved in material are responsive to the pleadings of the parties (R. 3, 6, 8, 47). They are responsive to this Court's mandate of December 5, 1944. Under the restricted jurisdiction granted the lower court by Section 1 of the Act to adjudicate **in the manner set out in section 2** and where, by Section 2 the Court of Claims is **directed to determine and render judgment,** judgment was mandatory. The Act is exclusive; the way it prescribes and no other. Judgment should have been so rendered. The mandate is construed to so order. Whence, the lower court, otherwise having determined everything and leaving nothing to be done except judgment to be entered, a writ of mandamus may be proper. *In re Potts, Petitioner*, 166 U. S. 263, 265. Other aspects indicate certiorari proper mode.

POINT NO. 2.

The second point believed overlooked or misapprehended and warranting rehearing is:

The majority below, outside of any jurisdiction conferred by the Special Act, made Special Finding of Fact construing the prior contract as not entitling petitioner to separate

payment thereunder for excavating caved-in materials, and, upon that basis, denied recovery for excavating caved-in materials as authorized by the Special Act. The court found by adding the following clause to the last sentence of finding 8 (R. 67):

> but, as to the work of disposing of the materials which caved in from the top of the tunnel, the plaintiff will have been paid for that work what he expected to receive under the contract and what he was entitled to receive at contract rates, when he is paid the contract rates for dry packing and grouting the spaces left by the cave-ins.

This finding is the crux of the case as decided below. Upon its authority, the majority concluded as matter of law that petitioner was not entitled to be paid for excavation of caved-in materials authorized by the Special Act, and thereupon refused judgment therefor. Except for this finding, judgment for said excavation would have been mandatory under the findings otherwise made. In other words, it is the issue which was decisive of the case below. It is wrong from every aspect: It is not based on evidence, nor on the commissioner's report, nor given upon the regular manner of hearing. It is contrary to Special Findings of Fact of the old contract itself. It conflicts with prior controlling decisions. It conflicts with other findings in the same judgment awarding large amounts for excavation of caved-in materials. It is contrary to and outside the jurisdiction of the restrictive mandate. Likewise it is contrary to what the Special Act authorizes and outside of the jurisdiction conferred. It is not a finding of fact. Neither is it a conclusion of law. It is irrelevant under the Act. These various aspects are exhibited next below.

(2a) This finding construing the prior contract is not based on evidence. There are no sustaining, evidenciary findings. The old contract itself is made part of the record, not as evidence but as findings, of which circumstance

special comment is made below. Finding 7 sets out provisions 48, 58 and 62 (R. 65, 66). Finding 1 sets out the whole contract by reference (R. 9-47). No evidence could transcend the contract. It may not be shown that the contract differed from that contained in the writing. *Labonte* v. *Lacasse*, 78 N. H. 489, 491. No part of the contract, neither par. 58 nor 62, states or implies that payments for drypacking and grout will pay for excavation of caved-in material. No part of the contract contemplated cave-ins. It contemplated solid rock. The lower court entirely misconceives the purpose of dry packing and grout. The absurdity is that no dry packing and grout were required to be filled into any space, caved-in space, space vacated by timbers, or other.

(2b) This finding 8, purporting to state petitioner's expectations and the meaning of the old contract, is not based on the commissioner's report. The commissioner's report is set out in full in Petitioner's Supplemental Brief, Case No. 26, October Term 1944, appendix thereto, pp. 34-37.

(2c) The finding is not based on hearing by the Court of Claims in the sense that it is the result of a three to two decision, one of the majority not having heard the oral arguments and having been absent for nearly three years. This point is not emphasized here having been previously presented to the Court in Petition for Rehearing denied February 4, 1946.

(2d) Special Findings 1 and 7, being the prior contract provisions, show, on the principle of the Clark Case, that Finding 8, as to what those provisions mean, is wrong. In the Clark Case, 96 U. S. 37, the lower court having found all the facts essential to judgment, sent up, not as evidence, but as Special Finding of Fact the documentary record of a court martial presumed to sustain another Special Finding of Fact, the crux of the case. This Court held that in law the former showed the latter to be wrong. In the

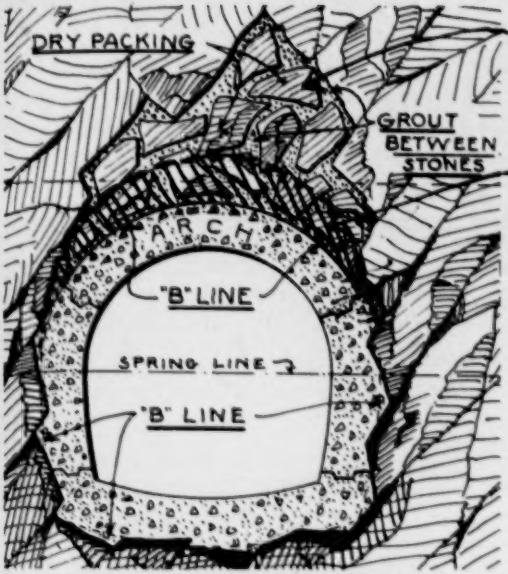
present case, the lower court made Special Finding of Fact 8 purporting to interpret the old contract provisions, the crux upon which recovery was denied. It made Special Finding of Fact 7 being the contract provisions. Finding 1 made Special Finding of Fact of the whole contract. Findings 1 and 7 show that in law the interpretation of the lower court in Finding 8 is wrong. See Appendix, par. (13).

(2e) This finding and decision thereon conflict with a prior controlling decision made in the same court, M. A. Long Company v. The United States, 79 Ct. Cls. 656, 666. The cited case was based on contract provisions identical with those upon which petitioner's case K-366 was based. They included provisions restricting payments for excavation to the area within the "B" pay line and for dry packing and grout. The project was another tunnel, designed by and constructed under the same officials. The roof there also caved in; suit for the excavation of the caved-in materials resulting. The court below there held that the excavation of the caved-in materials was not contract work but work outside the contract. It awarded judgment on *quantum meruit* on an implied contract. Here it held excavation of caved-in material to be contract work in the sense that it would be paid for by payments made for drypacking and grout filled into the caved-in spaces, the drypacking and grout definitely being contract work. What odd after-the-fact reasoning! Under par. 58 there could be no payments for excavation of materials from outside the "B" line, but tickle the roof a little and cause it to fall in and get paid for the additional excavation as well as more drypacking and grout. See Appendix hereto, par. (2). In the Special Act herein, the Congress in its own judgment fixed the prior contract rate for excavation as basis for payment.

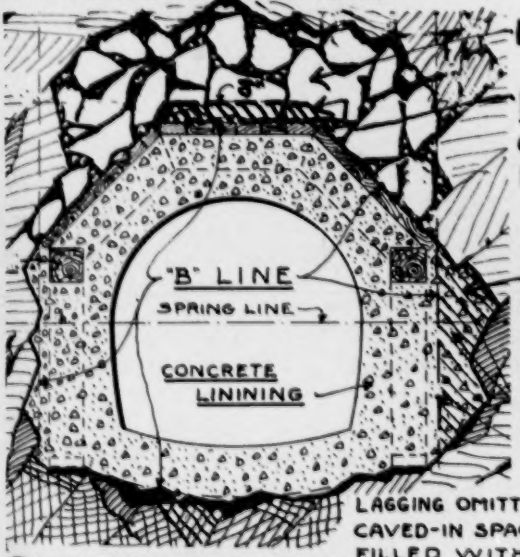
(2f) This finding interpreting the old contract conflicts with other findings and the awards thereon under this pres-

ent judgment. See sketch opposite. The lower court awarded judgment for 57 cubic yards of caved-in material at the contract rate, Finding 2 (R. 64). It also awarded for the dry packing and grouting which refilled that caved in space, Finding 5 (R. 65). It previously awarded for 723 cubic yards of caved-in excavation, Findings 1 and 2 (R. 64). It here allows for the dry packing and the corresponding grout which filled that much caved-in space in the rock sections. All payments were at the contract rates. It also found that the side walls had caved-in, likewise outside the agreed pay line, and payment for 287 cubic yards of excavation at the contract rate was awarded. This space was refilled with concrete also awarded at the contract rate, Finding 2 (R. 64). See Appendix, par. (2). These three instances in this judgment cover awards for 1067 cubic yards of excavation of caved-in materials at $17.00 per cubic yard amounting to $18,139, which caved-in spaces were refilled with drypacking and grout or with concrete in like amount. Yet the lower court refused award for the rest of the identically similar excavation of caved-in materials of which admittedly the Government has had the use and benefit and has not paid.

(2g) After the mandate, the lower court was restricted to what it had theretofore decided and what this Court had passed upon. It had first held (R. 50) that the meaning of the Special Act was plain and unambiguous, and that it was mandatory, if the Act were constitutional, that the lower court award for this item of excavation $81,277.00, the criteria specified having been met (R. 55). This Court ruled on the matter, 323 U. S. 1, 11; holding that "petitioner has sought to enforce the obligation, which the Government has assumed, to pay him for work done and not paid for. Congress has in effect consented to judgment in an amount to be ascertained by reference to the specified data." Thereafter, the lower court disregarded what it had held before and what this Court had decided, and un-



UNTIMBERED SECTIONS



TIMBERED SECTIONS

INCONSISTENT AWARDS FOR EXCAVATION OF CAVED-IN MATERIALS OUTSIDE "B" LINE

dertook anew to explore the old contract intermeddling where it was not authorized. *In re Potts, Petitioner,* 166 U. S. 263, 265. Not only has the lower court virtually overturned the Supreme Court, it went out of its jurisdiction in so doing.

(2h) This asserted "Special Finding of Fact" No. 8, construing the old contract, appears to be not a finding of fact but rather a misplaced conclusion of law. It is only a statement of fact in that it purports to state something, the meaning of an old document. A statement of what petitioner was entitled to receive under the old contract is a conclusion of law thereon. No jurisdiction is given the lower court by the Special Act to decide the meaning of the old contract and to apply it here. The lower court did not decide this particular matter in prior case No. K-366 when it had jurisdiction. May it construe it here when it has no jurisdiction to do so? A statement of what the court had actually found as a conclusion of law in the prior case might properly be included in findings here but this is not such an instance. Here the lower court, with no authority whatever, neither express nor implied, has stated out of hand, without reference to any part of the old contract, what petitioner was entitled to receive thereunder and on that kind of a finding decided the case.

POINT NO. 3.

The third point believed misapprehended and warranting grant of rehearing turns on the manner in which the lower court made decision on this question of payment for caved-in materials. This is not a rediscussion of what has been said in the petitions heretofore. Four judges heard the trial and agreed on everything, on all the facts and all the law, essential to judgment for all four of the items of claim authorized to be sued for by the Special Act. However, as to the item of excavation of caved-in materials, two of the judges insisted on making an additional finding of fact and

conclusion of law thereon, both quite *dehors* the Special Act, construing a contract which was basis of a prior and finally concluded suit, all actually irrelevant. Three of the four judges could not concur. Without giving notice to the parties and without reargument, the fifth member of the court, theretofore absent, joined with the said two to form a concurring majority of three and agreed to the extraneous finding of fact construing the old contract and thereupon denied the claim for the excavation of the caved-in materials. Whence point No. 3 is:

A balance of power exists between the lower court and this Court by virtue of Section 3 (a) and Section 3 (b) of the Act of February 13, 1925, which should be exercised for benefit of litigants in the lower court of first instance with respect of decisions of questions of law essential to "the proper disposition of a case," and the fact that the lower court neither granted a rehearing before the fifth judge and did not certify the disputed question under Sec. 3 (a) is warrant for this Court to grant certiorari under Sec. 3 (b). There was no hearing as required by rule of court and by law. There was no concurrence as required by law.

When the Congress, upon the representations of members of this Court, "abolished" the right of appeal to the Supreme Court from judgments of the Court of Claims and substituted, in lieu thereof, a review on certiorari by Section 3 (b) of the Act of February 13, 1925, it was intended and expected that the Court of Claims would make use of Section 3 (a) thereof and certify to this Court questions of law concerning which instructions were desired *for the proper disposition of a case.* While that authorization appears merely permissive in aid of the court, not obligatory, it was not intended that rights of claimants in that court to the fundamental American tradition of having at least one review of their cases should be completely forfeit. It was intended that by the combination of certification and

certiorari some of the essentials of the individual's rights to review should be retained. Every question in the Court of Claims, as a court of first instance, which might warrant review in a higher court, if there were such, is not a question of great national importance to be in the category of cases reviewable here. Thus it is possible, by the refusal or failure of the Court of Claims to decide or to certify, to squeeze out entirely, forever, what the Congress considered as the fundamental American rights of litigants even in that court.

It seems, from the language of the Act and from the testimony given at the hearings in Congress thereon, that in abolishing the right of appeal, it was intended that some balance be observed between certification and certiorari such as to "preserve" so much of that traditional American right to at least one review as would provide "for the proper disposition of a case". See testimony of Mr. Justice Sutherland, Senate subcommittee of the Committee on the Judiciary hearings on S. 2060, 68th Congress, 1st Session, February 2, 1924, p. 37 thereof; also pp. 38, 39, 47, Senator Spencer, Mr. Justice Van Devanter, Mr. Justice Sutherland. See also other hearings and reports in connection with this Act, e. g., Serial 45 Judiciary Com. House of Representatives on H. R. 8206, 68th Cong., 2nd Session, December 18, 1924, pp. 15, 17, note especially Mr. Sumners, Mr. Justice Van Devanter. Also see Senate Report No. 362 on S. 2060, 68th Cong., 1st, April 7, 1924; House Report No. 1075 on H. R. 8206, 68th Cong., 2nd, Jan. 6, 1925; Confidential Print. Senate Judiciary, Letter Chief Justice Taft, March 11, 1922, on S. 3164, 67th Cong., 2nd Sess. Also Wm. Howard Taft, 35 Yale Law Journal, 1, 9.

Was there no duty below to grant a rehearing before the judges who were to decide the case, or else to certify? That neither was done would seem to warrant certiorari.

This Point No. 3 is aimed principally at the validity of the judgment. It is contended that the judgment is not a judgment at all; that it is invalid by reason of lack of re-

quired concurrence and lack of real hearing. This is the question of the "how" of the case, the question of procedural or adjective law raised simultaneously by the four decisions below of October 1, 1945, of which the present case was one.

The statute controlling decisions of the Court of Claims provides "that the concurrence of three judges shall be necessary to a decision in any case," Rule 75 (b) of the Court of Claims, originally promulgated by the Supreme Court, now retained by the lower court of its own authority under the revised statute, provides that that court's "special findings shall be in the nature of a special verdict." This is a technical legal phrase and has great import here. The *nisi prius* in the Court of Claims is the body of judges who hear and try the case. They serve as a jury. Statute provides they may be the full bench of five, but not less than three. This is a legislative court, not a constitutional court. While a jury of twelve is done away with, virtually a jury of at least three is substituted, and, it is believed, the essential requisites for jurors, juries, hearings, hearing of oral arguments, independent judgments thereon, not the hearsay of other jurors, unanimous concurrence of the triers, and all the connotations of the words, trial, verdicts, and special verdicts, are here retained.

Verdict: *Roberts* v. *State*, 159 So. 373, 374; 26 Ala. App. 331. *State* v. *Ivanhoe*, 57 P. 317, 320; 35 Or. 150. 44 Words and Phrases 131. 27 Ruling Case Law, 834, § 2.

Special Verdict: *Hutchison* v. *Kelley*, 1 Rob. (Va.) 123. *Davis* v. *Chicago etc. R. Co.*, 93 Wis. 470. 24 LRA (N. S.) 1. Bouvier's Law Dictionary pp. 3392, 3393. *United States* v. *Clark*, 94 U. S. 73, 75. *Collins* v. *Riley*, 104 U. S. 322, 327. *Ward* v. *Cochran*, 150 U. S. 597, 608. *United States* v. *New York Indians*, 173 U. S. 464, 474 and a number of cases there cited. *United States* v. *Esnault Pelterie*, 299 U. S. 201, 205. Do 303 U. S. 26, 28, 29, 30 and numerous citations there. *Natron Soda Co.* v. *The United States*, 55 Ct. Cls. 66, 67. Clementson "Special Verdicts".

Concurrence of judges: Unanimous verdict: *Denver & Rio Grand R. Co.* v. *Burchard*, 35 Col. 539, 9 Ann. Cas. 994. *Capital Traction* v. *Hof*, 174 U. S. 1, 15. *Ebbing* v. *Borough of Schuylkill Haven*, 244 Pa. 505.

Juror. Jury. 23 Words and Phrases 419, 423. *State* v. *Potts*, 20 Nev. 389. *State* v. *Voorhies*, 12 Wash. 53. *State* v. *McCarthy*, 76 NJL 295.

Submission: *Ridgely* v. *Carey, Md.*, 4 Har. & McH. 167, 174.

Hearing includes oral argument: Trial ditto: *People* v. *Raco*, 47 N. Y. S. 2d, 448, 449. *Freeman* v. *United States*, CCANY, 227 F. 732, 743. *Chaffee* v. *Rahr*, 40 NYS 2d, 484, 488. *State ex rel Arnold* v. *Common Council*, 157 Wisc. 505, 510-512. *Wisconsin Telephone Co.* v. *Public Service Com.*, 232 Wisc. 274, 294. *Mason* v. *State*, 26 Ohio CC 535. *Barton* v. *Burbank*, 138 La. 997. *Durden* v. *People*, 192 Ill. 493. *Clanton* v. *Ryan*, 14 Colo. 419, 424. *McKenney* v. *Wood*, 108 Me. 335, 337. *Labonte* v. *Lacasse*, 78 N. H. 489, 490. *Bridges* v. *California*, 314 U. S. 252, 271.

CERTIFICATE OF GOOD FAITH.

This second petition for rehearing is presented in good faith and not for purpose of delay.

CONCLUSION.

Rehearing should be granted because, it is believed, important matters decisive of the case have been overlooked or misapprehended; and conflicts with controlling decisions, through inadvertance, were not drawn to the attention of this court:

The lower court has found, unanimously, all the ultimate facts essential to judgment under the Special Act and under the mandate but denied judgment. A ruling of the Court on this aspect should dispose of the case.

The lower court went outside of its jurisdiction under the Act and under the mandate to make finding of fact

construing an old contract, the deficiency or mischief of which the Special Act was designed to remedy; and on that basis, "where no obligation existed before", it held that no obligation exists now to pay for the contested item of excavation of caved-in materials. A ruling on that simple question should also dispose of the case.

The latter action below is wrong from whatever point it may be viewed. Not made with authority. Not based on evidence. Not based on commissioner's report. Not made upon regular manner of hearing. It is wrong on the principle of the *Clark Case*, 96 U. S. 37. It directly conflicts with controlling decision on the identical point decided in the *M. A. Long Case*, 79 Ct. Cls. 656, 666. It conflicts with other parts of the instant judgment where awards were made for excavation of 1017 cubic yards of caved-in material, but not for 4781 cubic yards also authorized.

A balance of power exists between the Court of Claims and this Court by virtue of Sections 3 (a) and 3 (b) of the Act of February 13, 1925, which should be exercised for the benefit of the litigant in the Court of Claims where four triers of his case disagree on a point of law essential to the disposition of the case. Since the lower court decided by bringing in a fifth judge, who was not present, and did not afford opportunity for reargument, and did not certify the question here, this Court, it seems to petitioner upon careful review of the record on the Act of February 13, 1925, is under obligation to grant certiorari. Petitioner recognizes that even though there is no review of the judgments of the Court of Claims as there is for every other Federal court, the law must be taken as it stands. It is possible upon examination of the record to view the matter as set out herein. It is so serious that ruling of this Court thereon appears necessary.

The absentee judge did not bring to the case the kind of hearing that is required by rule of court or by law. Neither was there concurrence as required by law.

There are intervening pending cases on Point No. 3.

All of petitioner's capital expended for the benefit of the United States is involved.

The question presented in the petition for certiorari involves more than its mild statement indicates. This Court sould recognize that this question really imports matters far transcending petitioner's personal interests; that his questions here presented are but the symbols of the problems of a great body of litigants, especially such as all who are obliged to bring their cases to the Court of Claims, those whose cases rest on Special Acts, or contracts, those whose cases are to be ultimately disposed of after mandates of this Court. The questions have for wider application than merely Court of Claims cases; whether a decision may stand which conflicts with an express statute, or conflicts with a prior controlling decision, or actually conflicts with itself; whether any court may disregard this Court's mandate; whether a judge who is obliged by code and by express statute to hear and is absent, yet may decide the facts, the law, and give judgment; whether there is not a balance of power between the Court of Claims and this Court to be exercised in favor of the litigant. Some of these questions are novel. They are all important. They are matters of substance. They are Federal in nature. They should be decided.

As for petitioner, this is his last chance.

It is respectfully urged that this petition for rehearing and the petition for certiorari be granted.

Respectfully submitted,

ALLEN POPE.

APPENDIX.

Statement of Proceedings Below, 1924 to 1946.

(1) Original suit based on contract for tunnel. Misrepresentation geological data alleged. Quatum meruit claimed for excavating materials caved in from roof above pay line. Court of Claims held misrepresentation not proved; denied claim. 76 Ct. Clms. 64, March 7, 1932. Judgment became final.

Suit No. K-366 in the Court of Claims, *Allen Pope* v. *The United States*, was based on a contract as cause of action. Officers of the Army Engineer Corps represented the United States. The contract, dated December 3, 1924, provided for the construction of a tunnel for the water supply system of the District of Columbia. As inducements for agreement to limit payments, on unit price bases, for excavation and other work performed, to a fixed pay line, called the "B" line, the Government made representations as to adequate use of timber, use of concrete, use of dry packing and grout, all as the conditions actually encountered might develop need therefor, and specified that material from the excavation would be permitted to be used in making crushed rock for concrete and stone for drypacking. As additional inducement under this contract, the Government warranted descriptions of geological formations revealed by test borings which it made on the tunnel site, the said descriptions being given on the contract drawing and indicating "hard rock" for most part. Actually, no hard rock was encountered in the tunnel. The ground caved to the surface above in two places and caved above the agreed "B", or pay, line throughout the whole length of the tunnnel. It even caved in where the Government's test holes were met with; and, at every such point, the contracting officer required timber supports to be used.

Petitioner claimed on a *quantum meruit* $85,950.00 for additional cost of excavation, the Government having paid only for excavation of materials originally within the "B"

line, but having required all excavation to be done and having received the benefit. This additional expense was solely the cost of excavating the materials which caved in from above the agreed pay line. The Government paid separately for other items of expense thereby involved such as all timbering, some increased excavation, some concrete, and some drypacking and grout; but declined to pay for any of this work of excavation and concrete, and for most of the drypacking, and grout pertaining to spaces outside the agreed "B" line. No part of such work would have been necessary nor incurred had the ground been "hard rock" as the Government represented nor if the Government had permitted adequate use of timber to support the excavation. The Court of Claims held that misrepresentation was not proved; that the additional cost of excavation was not established, though it found as fact that it was "materially increased". The claim was denied. 76 Ct. Cls. 64, decided March 7, 1932 (R. 122; R. 9-47; R. 110-146). The judgment became final, motions for new trial having been denied, and term of court having lapsed.

(2) Another contractor, under identical contract provisions, concurrently constructed a similar tunnel for the same water system. Ground also caved in from roof above pay line and caved-in materials were excavated. Upon suit therefor, Court of Claims, of own motion, awarded quantum meruit on different basis than claimed. Court there construed the same provisions, which it now construes differently, defeating petitioner's present claim under the special act. M. A. Long Company v. The United States, 79 Ct. Cls. 656, decided June 4, 1934.

Shortly antedating petitioner's contract, the United States, acting through the same officials, under identical specifications and designs, made contract with another contractor, the M. A. Long Company, to construct another tunnel as part of the same water system. Geological conditions were generally observable at the site. No warranty

as to geological formation was made. Representations as to use of timber, use of excavated materials, use of concrete, use of dry packing and grout where necessary, as inducements to agree to the fixed "B" or pay line for payments at agreed unit rates were the same in both contracts. Construction work under both contracts was concurrent. There, the ground, in one place, caved in over the "B" line to the surface of the ground above. The caved-in materials were required to be excavated but were not paid for. Suit resulted in the Court of Claims. The court, of its own motion, awarded a *quantum meruit* as on an implied contract, the Government having required the work to be done and having received the benefit. *M. A. Long Company* v. *The United States*, 79 Ct. Cls. 656, decided June 4, 1934. Of particular present significance herein (ante, p. 9) is the circumstance that the court below there held with respect to the excavation of the caved-in material *id.* 666:

> It was additional work not within the contemplation of the parties when the contract was made * * *

(3) Petitioner's substantive contract rights concluded by 76 Ct. Cls. 64. Testimony M. A. Long Case, Id. revealed sources of proofs of irregularities in petitioner's case whereby acts of respondent's representatives, extrinsic to the issues, had foreclosed to petitioner a real trial of the issues. Three out-of-term motions for new trial on such basis denied, but court impressed. Written opinions given in 81 Ct. Cls. 658; 86 Ct. Cls. 18. Certiorari thereon denied, not on the merits under the contract, but on the alleged irregularities. 303 U. S. 354.

Petitioner's substantive rights under his contract stood definitely concluded by the final judgment of 76 Ct. Cls. 64. Other considerations accounted for his refusal for three years thereafter to accept the amount that had been appropriated in settlement of that judgment. There had been gross irregularities in the trial. The testimony and findings in the said *M. A. Long case*, 79 Ct. Cls. 656, seemed to

open ways in which to present said irregularities to the court such that, notwithstanding the finality of the judgment, it might be shown that petitioner had never had a real trial of the issues in his case, and the same be opened for trial. Investigation revealed many frauds perpetrated on the Government, and on the court, as well as on petitioner. It was too late to complain of deceptions. Petitioner thought it not too late to complain of acts on the part of respondent's representatives, its agents, engineers, witnesses and attorneys, which were extrinsic to the issues in suit, but which had prevented the petitioner, the unsuccessful party, from having a full and fair trial of the issues in his case. Petitioner made three out-of-term motions for new trial (motion for a trial he termed the fourth and fifth) and accompanied them by evidence, as required, showing among other things fabricated job reports, deleted records of testimony, scratching the court's docket, destruction of evidence, destruction of the test-boring cores, which would have proved the character of the ground at a glance, manufacture of evidence which the court used verbatim as basis for its decision defeating petitioner's claim, threats of avowed purpose to wear out petitioner by prolonged litigation, besides many downright frauds upon both the Government and the court. These out-of-term motions were based on the proposition not that the court was mistaken but that it was probably misled. The court declined to allow the allegations to be proved. No appeal lay to any higher court. The time was after the Act of February 13, 1925, and before the Act of May 22, 1939, when no question of fact could be brought to this Court on certiorari. The court below was impressed, but only to the extent of suggesting legislation in Congress which would remedy its asserted lack of jurisdiction. It offered petitioner, in open court, to provide Congress with factual data with respect to the irregularities listed. Its written decisions, 81 Ct. Cls. 658 and 86 Ct. Cls. 18, as well as the petition for certiorari, 303 U. S. 654, were concerned only with this question of

acts of respondent extrinsic to the issues which were contended to have foreclosed a real trial of the issues. They were not concerned with petitioner's substantive rights under the contract, which, at that time, even as now, stood finally concluded.

(4) On advice of lower court, petitioner sought legislation to remedy the mischief whereby the court was misled and petitioner prevented having real trial of issues by reason irregularities practiced by respondent's representatives; the act to supply the necessary jurisdiction. The Attorney General opposed. Enactment failed. H. R. 9082, Jan. 20, 1938; S. 3406, Feb. 7, 1938; S. 744, Jan. 17, 1939.

Acting upon the lower court's suggestion and on copies of Acts of Congress and decisions of the Court of Claims based thereon as given him by the then Chief Justice, petitioner applied to Congress for *legislation to remedy the mischief caused by the irregularities and extrinsic acts* alleged to have misled the court so as to have foreclosed to petitioner a real trial of the issues, and whereof the court complained that it had no jurisdiction. Petitioner merely asked Congress that the Court of Claims be granted jurisdiction accordingly, i. e., "as though his fourth motion for new trial were granted". See titles of bills; citations below. The Attorney General opposed on the ground that such legislation would reopen all the issues and that petitioner had had his day in court. Petitioner's first three bills in Congress were to the same purpose and met the same fate. H. R. 9082, Jan. 20, 1938; S. 3406, Feb. 7, 1938; S. 744, Jan. 17, 1939. See Appendix to Petition for Certiorari, pp. 15, 16.

(5) Petitioner abandoned effort to get legislation to revive substantive rights of contract. Instead he petitioned Congress to create new liability of the Government for beneficial work done and remaining unpaid for, naming the "excavating of materials which caved in over the tunnel arch".

Attorney General withdrew opposition, tacitly approved bill, which was enacted as 56 Stat. 1122, approved February 27, 1942.

Petitioner thereupon abandoned effort to secure legislation which would enable reassertion of any substantive rights under the contract, either by the parties or by the judiciary. The judgment, 76 Ct. Cls. 64, based on the contract stood then and still stands conclusive upon all, i.e., the parties, the Congress and the Judiciary. Petitioner asked Congress to create a new liability of the Government *to remedy the mischief where petitioner had performed work for the Government of which it had received the benefit but for which it had not paid*, and named, among particular items, "the work of excavating the materials which caved in over the tunnel arch". As basis for payment, he requested that the unit rates of the prior contract be named for the four different items to be claimed, i. e., for excavation, concrete, dry packing, and grout. No conditions of any nature of the prior contract were specified. The Attorney General tacitly approved the bill so drafted by not opposing it and by suggesting it to be matter within the province of Congress to decide for itself. The bill was enacted as 56 Stat. 1122, approved February 27, 1942.

(6) Court of Claims declared special act unconstitutional; singled out claim for excavation of materials caved in from tunnel roof to demonstrate that Congress could not authorize adjudication of claim once finally decided in that court, nor prescribe a method for adjudication. 100 Ct. Cls. 375. January 3, 1944.

In an action, No. 45704 in the Court of Claims, pleaded on the rights explicitly expressed in the Special Act and relying upon the prescription for adjudication therein given, the court below now having another as Chief Justice and three new judges, denounced the Act as unconstitutional, as being beyond the power of Congress to authorize adjudi-

cation of a claim once finally decided by that court and as wholly outside its province to prescribe a manner of rendering judgment to the judiciary. As illustrating its decision, it singled out and derided the express provision supplying right of action at the contract rates "for the work of excavating materials which caved in over the tunnel arch." 100 Ct. Cls. 375 (R. 55-57) the same being the item still being contended for.

(7) On certiorari, this court held special act constitutional; declared Congress had created new liabilities of the Government for the work described, and was within its province is establishing the prescriptions for judgment set out.. 323 U. S. 1, November 16, 1944; mandate December 5, 1944.

Upon issuance of writ of certiorari to the Court of Claims reviewing their judgment of 100 Ct. Cls. 375, this Court held the Special Act constitutional; that its provisions authorizing claims, including the express claim "for the work of excavating the materials which caved in over the tunnel arch", were new liabilities of the Government created by Congress and that the prescriptions to the Court of Claims for manner of adjudication were also wholly within the constitutional province of the Congress. The mandate of December 5, 1944, ordered the Court of Claims to render judgment for petitioner in accordance with this Court's opinion of November 16, 1944. 323 U. S. 1.

(8) Responsive to the Mandate, Court of Claims unanimously found all facts essential to judgment under special act for all items claimed including item 2 pleaded as "excavating materials which caved in over the tunnel arch". Recovery therefor denied, 62 Fed. Sup. 408, October 1, 1945.

Responsive to the mandate of December 5, 1944, it is here important to observe because heretofore over-shadowed, the lower court unanimously made Special Findings of Fact

of all the ultimate facts essential to judgment for the claim pleaded under the Special Act "for the work of excavating the materials which caved in over the tunnel arch". These findings of ultimate fact were sustained by other findings of evidenciary fact showing total quantities, quantities otherwise paid for, rates, manner of computation, etc. These Special Findings of Fact were based on the evidence, upon the report of the commissioner, and upon the oral argument. They are responsive to the pleadings, and responsive to the mandate.

(9) Recovery denied for item 2 excavation caved-in materials. 62 Fed. Sup. October 1, 1945.

Notwithstanding the complete and sufficient Special Findings of ultimate fact, and notwithstanding this Court's mandate, the lower court denied recovery for this item "for work of excavating the materials which caved in over the tunnel arch". 62 Fed. Sup. 408, October 1, 1945. (R. 70-83).

(10) Conflicts in this decision: Three other items excavation of caved-in materials awarded. But this identical item denied. 62 Fed. Sup. 408, October 1, 1945.

Also of importance in connection with the instant petition, as having been completely overshadowed heretofore, is the fact that the lower court, likewise unanimously, made positive findings of facts essential to judgment for three other items of excavation of materials caved in from outside the "B" pay line and awarded judgment therefor as claimed and at the same time also allowed payment for the refilling of the caved-in or thereby voided spaces. It awarded for 57 cubic yards of materials caved in over the arch at the contract rate (R. 69) and for the drypacking and grout which refilled that space (R. 71). It previously paid at the contract rate for 723 cubic yards of materials caved in over the arch (Fdg. 1, R. 64) and here paid for refilling the space so void with drypacking and grout. It

awarded here at the contract rate for 287 cubic yards of excavation of materials caved in outside the pay line in the walls and also paid for refilling the resultant spaces with concrete (R. 69-70). See sketch opposite p. 10, ante.

(11) Crucial Finding. Majority below made special finding of fact that, under original contract of prior case, the work of excavating materials which caved in over the tunnel arch was contract work payable by payments made for drypacking and grout thereunder, not by separate payment as for excavation. Finding not based on Commissioner's report; nor on hearing before all deciding judges; nor on evidenciary findings, but contrary thereto. Finding not responsive to pleadings; not responsive to mandate; not made within the jurisdiction granted by special act.

The majority below, two judges dissenting, made what served it as the decisive finding of the case to deny petitioner payment "for the work of excavating the materials which caved in over the tunnel arch", by adding the following statement to finding 8 (R. 67):

> but, as to the work of disposing of the materials which caved in from the top of the tunnel, the plaintiff will have been paid for that work what he expected to receive under the contract and what he was entitled to receive at contract rates, when he is paid the contract rates for drypacking and grouting the spaces left by the cave-ins.

This finding is contrary to the evidenciary findings, i.e., the prior contract provisions, which were also set out in finding 7 and by finding 1, noted post, p. . This finding is believed not made within the court's jurisdiction under the Special Act. It is not based on the commissioner's report. The commissioner's report is set out in full Case No. 26, October Term, 1944, Appendix to Petitioner's Supplemental Brief on Petition for Writ of Cer-

tiorari, pp. 34-37. It is not based on the hearing in the sense that the judge who supplied the requisite third vote did not hear the oral argument. It is not responsive to the pleadings. Neither party so raised the issue. No jurisdiction is given by the Special Act to readjudicate anything under the old contract. The jurisdiction of the Court of Claims over issues of the old contract lapsed with its final judgment in case No. K-366, 76 Ct. Cls. 64.

(12) Finding conflicts with court's interpretation same contract provisions in M. A. Long Case.

This finding (Is it not really a conclusion of law, interpreting the old contract?) is directly opposed to that court's interpretation of identical contract provisions in the M. A. Long Case, *ante* p. ..... In that case, the court held that excavation of caved-in materials was not contract work. In petitioner's case, it holds that payments for drypacking and grout pay for that work, i.e., that it is contract work.

(13) Evidenciary findings of old contract provisions. Special findings of fact not evidence.

The lower court made evidenciary findings in respect of what the old contract obligations were. They do not sustain the conclusion to Finding 8. As its Finding 7 (R. 65, 66), the court below sets out specification paragraphs 48, *Measurements;* 58, *Excavation in Tunnel;* and 62, *Drypacking and Grouting in Tunnel.* Finding 1 by reference made the whole of the original contract part thereof, including all the specifications and plans, the same being part of the original findings and so incorporated in the transcript of record hereof (R. 63; R. 110-122; R. 9-47; R. 146).

It is important to observe that these evidenciary findings are Special Findings of Fact, not merely evidence incorporated and sent up with the transcript of the record in the case.

(14) Finding made by majority of three judges, one of whom was not present at trial; two judges who were present dissented.

This concluding finding, made by the majority below, and upon which the same majority denied recovery for the excavation of caved-in materials, Item 2 of the pleading (R. 3, 4-6, 8), was made by three of the five judges of the court, one of whom had not theretofore participated in the case and who had not heard the oral arguments. It was opposed by two judges who had participated and who had heard the oral arguments. The said judge, whose vote provided the requisite concurrence of three, was absent on war assignment during the trial. He did not return until June 30, 1945, when the court was already in vacation recess. He was qualified; and otherwise possessed the jurisdiction as did the other judges. No notice was given by the court to the parties that the said judge was to sit in decision, nor were the parties invited to reargue the case before him, before a full bench. Instead, the court, on October 1, 1945, the first day after recess, announced its judgment in the foregoing manner, denying claim for excavation of caved-in materials.

(15) Petition for certiorari. Voluminous transcript sent up consists mostly of findings and references to old contract and to old, concluded case based thereon; completely dominates and overshadows matter pertinent to present case.

Petitioner herein petitioned this Court for issuance of writ of certiorari to the Court of Claims for review of the latter's judgment of October 1, 1945. The lower court sent up as transcript of the record in the case a great mass, 146 pages, of data pertaining to the previously decided case based on the original contract. In the first place, its present findings of fact relate almost entirely to the old case under the contract, though they do include the facts essential to judgment in this case pleaded under the Special Act.

In petitioner's Case No. 26, October Term, 1944, the lower court sent up the *contract as evidence*. In the present case No. 520, October Term, 1945, they sent up the *contract as findings*. They also made findings of the prior findings based on the contract. They further sent up as evidence, as part of the transcript, the opinion of the court below in that case based on the contract, 76 Ct. Cls. 64 (R. 122-145). The court's present opinion as well as the dissenting opinion are devoted almost exclusively to discussion of merits under the contract. Petitioner's counsel expressed the question presented in very broad terms, i.e., "has the court properly interpreted and applied the Special Act of February 27, 1942 (56 Stat. 1122), in accordance with decisions and mandate of this Court?" Further and possibly without sufficiently explicit reference, the assignments of error were likewise stated in general terms. Thus the original contract and issues based thereon dominate the present record, completely overshadowing the few paragraphs given to the issue raised by the Special Act.

(16) Petition for certiorari denied. No grounds given.

This Court denied petition for certiorari on January 2, 1946, without stating grounds for denial.

(17) Petition for rehearing based on three other similar three-to-two decisions intervening below. Petition rehearing denied; grounds not stated.

After denial of certiorari three other, similar, three-to-two decisions below stood intervening. In each case the vote of the same absentee judge supplied the necessary third concurring vote. Further action thereon was pending. After denial of certiorari in petitioner's case, the lower court overruled motions for new trial in two. Petitioner then filed petition for rehearing predicating the same upon intervening pending cases based upon the principle of the absentee judge casting the conclusive vote in the Court of Claims where the *nisi prius* is the court, and from

whose decision no appeal lies as of right. These three pending cases were listed on page 13 of petitioner's Petition for Rehearing. This Court, again not stating grounds, denied the petition for rehearing on February 4, 1946.

(18) The present status of these cases is as follows:

No. 45,596, further action was dropped; the then standing decision, right or wrong, enabled an estate to be settled. In No. 45,889, the plaintiff therein made two successive motions for new trial contending that its case was not submitted on the briefs, but on oral argument, which was not heard by all the judges who gave decision; new trial was denied. In the third other case, No. 45,455, *Geo. F. Driscoll Company* v. *The United States,* motion for new trial was denied and the case is now here No. 1034, October Term, 1945, pending on petition for certiorari.